QUEEN'S BENCH

REPORTS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, ESQ.,

AND

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BARRISTERS AT LAW.

NEW SERIES.

VOL. IX.

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TRINITY TERM AND VACATION, MICHAELMAS TERM AND VACATION,
AND HILARY TERM,
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WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

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ERRATA.

Page 135. last line but 2, for "plea" read "avowry;" and in p. 136. lines 10. 18. and 21, for "declaration" read "avowry."
164. marginal note, last line but 6, for "defendant" read "plaintiff."
202. last line but 6, for "plaintiff" read "defendant."
236. lines 11. 13, for "*November*" read "*December*," and for "before the Grand Inquest of this Court" read "at the *Middlesex* Sessions." (An indictment had been preferred in *November* before the Grand Inquest, but was, obviously, not the indictment in question.)
289. line 9, for "a plea" read "pleading."
388. line 6, for "on" read "a."
390. line 5, 6, for "indorsed" read "enforced."
451. line 14, for "*Regina*" read "*Rex*."
577. last line but 4, for "plaintiff" read "defendant."
625. lines 16. and 22, for "*Tennant*" read "*Pennant*."
713. marginal note, last line but 7, for "plaintiffs" read "defendants."
754. marginal note, line 4, for "fi. fa." read "ca. sa."
918. last line but 4, for "*Rex*" read "*Regina*."
956. line 1, for "defendant's" read "plaintiff's."
991. marginal note, line 38, for "must" read "cannot."
1023. last line, for "discharged with costs," read "refused."

IN VOL. X.

542. note (*g*), for "2 *Q. B.*" read "1 *Q. B.*"

For other Errata, see the Volume.

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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM AND VACATION,

IX. VICTORIA.

The Judges who usually sat in Banc during this Term and Vacation were,

Lord DENMAN C. J.
PATTESON J.
WILLIAMS J.

(COLERIDGE J. was absent in consequence of ill health; WIGHTMAN J. in the Bail Court.)

TANNER, Executrix of JOHN TANNER, *against* WILLIAM BURY MOORE.

Friday, May 22d.

ASSUMPSIT. The first count of the declaration recited that, before and at the time of defendant's promise after mentioned, *J. Tanner*, the testator, in his life-time, had commenced an action on promises against *John Bayly Moore* as maker of a promissory note for 165*l.* payable to the said *J. Tanner* with interest, which sum and interest were then wholly due and unpaid to

Declaration, in assumpsit, stated that *T.* had commenced an action against *M.* for 165*l.*; and that, in consideration of *T.*'s "agreeing to stay the said action," defendant promised to pay *T.* the 165*l.* within six months next after the decease of *A.*

The promise, as proved, was, to pay, as above, in consideration of *T.*'s "having agreed" to stay the action.

Held no variance; and that a valid consideration was proved.

Thornton v. *Jenyns* (*a*). [Lord *Denman* C. J. referred to *Shenton* v. *James* (*b*).] *Greenwood* also argued that, even if the consideration was partly executed, it would still support a promise; citing *Com. Dig. Action upon the case upon Assumpsit*, (B 12.).

Crowder and *Merivale*, contrà, contended that "having agreed" must be taken to imply an agreement made once, and complete at a past time; and which, therefore, being an executed consideration, could not support a promise, no request being averred; notes (1) and (*a*) to *Osborne* v. *Rogers* (*c*); and that the allegation of performance by the plaintiff, in the latter part of the count, was immaterial and could not aid. [*Wightman* J. Your argument is, that, if the agreement stated in the declaration were "In consideration of your having agreed to pay 5*s.* a week to *A.*, I will pay you 165*l.* at his death," the consideration would be insufficient, no request being averred, although the plaintiff alleged performance of his own part of the contract.] It would. If the actual forbearance is relied upon, the averment should have been that the defendant promised in consideration that *J. Tanner* would forbear, and that he did forbear accordingly; note (2) to *Forth* v. *Stanton* (*d*).

Crowder also cited, as to the construction and effect of the agreement, *Roscorla* v. *Thomas* (*e*) and *Raikes* v. *Todd* (*g*).

Payne v. *Wilson* (*h*) was a different case from this:

(*a*) 1 *Man.* & *G.* 166; particularly the judgment of *Tindal* C. J., pp. 188, 189.

(*b*) 5 *Q. B.* 199.

(*c*) 1 *Wms. Saund.* 264. 6th ed.

(*d*) 1 *Wms. Saund.* 211, 211 *a.* 6th ed.

(*e*) 3 *Q. B.* 234.

(*g*) 8 *A.* & *E.* 846.

(*h*) 7 *B.* & *C.* 423.

there the consideration set out was that plaintiff, at defendant's request, "would consent" to suspend proceedings; and the agreement given in evidence recited that plaintiff had, at defendant's request, "consented to suspend proceedings," and given a day for payment. In *Butcher* v. *Steuart* (*a*) the consideration alleged was that the plaintiff "would" procure the release of *R. S.* from arrest; the actual agreement was: "in consideration of your having" released *R. S.*, I "engage, within one month from this date, to pay you" &c. This was reconciled with the declaration by the forced construction that payment was to be made in a month in consideration of the plaintiff "having then released" *R. S.* Here no such construction can be resorted to. And in that case the actual release, not the agreement, was relied upon as the consideration. The release, even if made at the same time as the promise, might be deemed a thing continuing. [*Patteson* J. The learned Judge evidently did not treat it so. And a voluntary release, once made, would be done and over. The plaintiff could not retake.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The declaration in this case ran that, in consideration of the testator agreeing to stay proceedings in an action on a note, the defendant promised to pay the amount in a certain time. The written guarantee, when produced, appeared to be in consideration "of the plaintiff's

(*a*) 11 *M. & W.* 857.

having agreed to stay" &c. A rule for a nonsuit was obtained on the ground of variance.

The case of *Roscorla* v. *Thomas* (*a*) was strongly relied on. There however the declaration ran, in consideration that the plaintiff *had* bought a horse, the defendant warranted it sound. It was no question of variance; but the declaration was held bad in arrest of judgment, — a past consideration, which that confessedly was, not being sufficient to support the promise. The case of *Shenton* v. *James* (*b*) was also cited. But there the question was whether the instrument was a promissory note, which depended on this, whether the money mentioned in it was payable at all events, which it clearly was, the consideration which was stated on the face of the instrument not being necessarily prospective. On the other side *Butcher* v. *Steuart* (*c*) was cited. That case goes even farther than the present; for there the declaration ran "in consideration that the plaintiff would procure the release of the said *Robert Steuart*;" and the written instrument ran, "in consideration of your having released the above named defendant." Both the declaration and the instrument there speak of a fact which can happen only once, and can hardly be continuing; and yet the Court held that there was no variance. Here the declaration speaks of the consideration as the plaintiff *agreeing to stay* &c. Now that word necessarily implies a continuing agreement till the action is stayed; and the words of the instrument, "having agreed," necessarily imply the same; for it would be absurd to suppose that the defendant bound himself to

(*a*) 3 *Q. B.* 234.
(*b*) 5 *Q. B.* 199.
(*c*) 11 *M. & W.* 857.

pay the money in consideration of the plaintiff merely having at a past time agreed to stay the proceedings, unless that agreement was continuing at the time of the signing of the instrument, and until the action was actually stayed. The real meaning of both expressions is in truth the same: and this rule must be discharged.

Rule discharged.

JAMES *against* BROOK.

Friday, May 22d.

CASE for slander. The declaration contained three counts.

The first count, after a general allegation of plaintiff's previous good character, alleged that, whereas also plaintiff, for a long time before the committing &c., had been and still is a peace officer of our Lady the Queen, and superintendent of the police of the borough of *Leeds* in the county of *York;* and, by reason thereof, plaintiff, during all that time, had and received a certain salary and reward for and in respect of his said office and employment of superintendent as aforesaid: And whereas also plaintiff hath always behaved and conducted himself, in his said office and employment, with fidelity and reputation and propriety, by means of which said premises plaintiff, before the committing &c.,

A declaration for slander alleged that plaintiff was a salaried superintendent of police at *L.*, and that it was his duty, as such, to conduct himself temperately, and with decency and propriety, while on duty, and to hinder and repress indecent and disorderly conduct in the police office: that defendant, intending to injure plaintiff in his office, and cause it to be believed that he had misconducted himself as such superintendent, and cause him to be dismissed from his office, in a discourse which he had concerning plaintiff, as such superintendent, and concerning plaintiff's conduct in his office, falsely, &c., spoke and published concerning plaintiff, and concerning him as such superintendent, and concerning his conduct in his office, the false, &c. words: "I" (meaning defendant) "saw a letter, two or three days since, regarding an officer of the *L.* police force" (meaning plaintiff), "who" (meaning plaintiff) "had been guilty of conduct unfit for publication."

Judgment arrested, after verdict, on the ground that the declaration did not shew how the imputation was connected by the speaker with plaintiff's office.

had deservedly obtained the good opinion &c.: and also plaintiff was acquiring great gains and profits by means of the said salary and reward in his said office and employment: And whereas also it was part of the duties of the said office and employment that plaintiff, as such superintendent, should have the immediate direction of the night police force in the said borough of *Leeds*, and that plaintiff, as such superintendent, should from time to time attend during the night time at the police office in the said borough, to which police office persons arrested during the night time in the said borough were from time to time brought for the purpose of being kept in custody there until the persons so arrested could be conveniently taken, in the morning of the day after any such arrest, before some justice of our said Lady the Queen assigned to keep the peace within the said borough: And whereas it was the duty of the plaintiff, as such superintendent as aforesaid, to conduct himself temperately and with decency and propriety whilst on duty as such superintendent at the said police office as aforesaid, and to hinder and repress indecent and disorderly behaviour in the said police office: The count then charged that defendant, well knowing the premises, but contriving, and falsely and maliciously intending, to injure plaintiff in his said good name, fame and credit, and in his aforesaid office and employment, and to bring him into great scandal and disgrace, as such superintendent, with and amongst all his neighbours and other good &c., and to cause it to be suspected and believed that plaintiff had misconducted himself as such superintendent, and to cause the plaintiff to be dismissed from and deprived of his said office and employment, heretofore &c. (the count then

charged the speaking by defendant of certain words concerning plaintiff).

The third count charged that, afterwards, to wit on &c., in a certain other discourse which defendant then had of and concerning plaintiff, and of and concerning him as such superintendent as aforesaid, and of and concerning the conduct of plaintiff in his said office and employment, in the presence and hearing of divers good &c., defendant, further contriving and intending as aforesaid, falsely and maliciously spoke and published of and concerning plaintiff, and of and concerning plaintiff as such superintendent as aforesaid, and of and concerning the conduct of plaintiff in his said office and employment, the false, scandalous, malicious and defamatory words following, that is to say: "I" (meaning the defendant) "saw a letter, two or three days since, regarding an officer of the *Leeds* police force" (meaning the plaintiff), "who was superior in rank to *Child* (*a*), and who" (meaning the plaintiff) "had been guilty of conduct unfit for publication." The declaration then averred general damage, and that persons, not named, had refused to have acquaintance with plaintiff.

The defendant pleaded Not guilty; and several pleas of justification, to which the plaintiff replied De injuriâ.

On the trial, before *Coltman* J., at the *Yorkshire* Spring assizes, 1845, a verdict was found for the defendant on the issue upon the plea of Not guilty, so far as related to the first two counts, and for the plaintiff on the residue of that issue and on all the other issues.

Watson, in *Easter* term, 1845, obtained a rule nisi for arresting the judgment.

(*a*) It appeared on the trial that *Child* was an officer in the *Leeds* police.

Hugh Hill shewed cause in last *Easter* vacation (*a*). The third count shews an actionable slander on the plaintiff in respect of his office. The introductory allegations of the first count, which are incorporated in the third, shew that the plaintiff held the office of superintendent of police, for which he received a salary, and that it was part of his duty to conduct himself with decency and propriety while on duty. Then the third count sets out a discourse had by the defendant concerning the conduct of plaintiff in his said office, in which defendant publishes, concerning the conduct of plaintiff in his said office, words imputing that he had been guilty of conduct unfit for publication. The declaration thus connects the imputation with the plaintiff's conduct as superintendent. *Lumby* v. *Allday* (*b*) is not a similar case to this. The misconduct there imputed was not shewn to be such as to render the plaintiff unfit for the employment described in the declaration: here the unfitness is distinctly pointed out, since it is alleged that the plaintiff was bound to conduct himself, in his office, with decency and propriety, and it appears that the impropriety is imputed concerning the conduct of the plaintiff in the office. All the allegations must, after verdict, be taken to be proved.

Watson and *Hoggins* were now heard in support of the rule. The third count shews no connection between the alleged slander and the introductory allegations. It does not appear how that which is imputed should dis-

(*a*) *May* 9th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js. *Coleridge* J. was absent on account of illness. *Wightman* J. was sitting at Nisi Prius.

(*b*) 1 *C. & J.* 301; *S. C.* 1 *Tyrwh.* 217.

qualify for the employment. In *Lumby* v. *Allday* (*a*) *Bayley* B. refers to the language of *De Grey* C. J. in *Onslow* v. *Horne* (*b*). According to *Wilson*'s report of the latter case, it is laid down, as a general rule, "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades and business, and do or may probably tend to their damage." The expression in Sir *W. Blackstone's* report is, "if the words may be of probable ill consequence, to a person in trade, a profession, or an office." *Bayley* B. says: "The objection to the rule, as expressed in both reports, appears to me to be, that the words 'probably' and 'probable' are too indefinite and loose, and unless they are considered as equivalent to '*having a natural tendency to*,' and are confined within the limits, I have expressed in stating the defendant's objections, of shewing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant." [*Williams* J. How is a "natural" tendency stronger than "probable?"] The only charge here is, that the plaintiff's conduct has been "unfit for publication." Many instances of such conduct might be suggested where the imputation of it would have no tendency to deprive the plaintiff of his office; as, for instance, licentious intercourse with females, or even the obtaining information from prostitutes in the course of his duty. [Lord *Denman* C. J. The inquiry itself, from its nature, might be unfit for publication, without any culpability on the part of the plaintiff.] *Hearne* v.

(*a*) 1 *C. & J.* 301; *S. C.* 1 *Tyrwh.* 217.

(*b*) 3 *Wils.* 177. 186; *S. C.* 2 *W. Bl.* 750. 753. See *Alfred* v. *Farow*, 8 *Q. B.* 854. 859.

Stowell (*a*) shews that the record ought to point out how the imputation affects the plaintiff in his calling. In *Brayne* v. *Cooper* (*b*) the declaration charged that the plaintiff carried on the trade of a stay-maker, and that defendant said of him, in his said trade, "the business of a staymaker does not keep him, but the prostitution of the person in the shop; after it is shut, it is as bad as any bawdy-house in the town." It was held that, unless the words were believed to be an imputation of keeping a bawdy-house (in which case they would have been actionable without reference to the trade), the action could not be sustained: *Ayre* v. *Craven* (*c*) was there referred to, and is in point here. In that case the words were charged to have been spoken concerning plaintiff in his profession of a physician; and they imputed adultery. But the Court arrested the judgment, saying that "the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." The same principle results from *Goldstein* v. *Foss* (*d*).

Further, no action lies on words so general as these: instances, in which imputations more specific have been held incapable of sustaining an action, are given in 1 *Vin. Abr.* 414. *Actions* [*for words.*] (G. a).

Lord DENMAN C. J. I cannot distinguish this case from *Ayre* v. *Craven* (*c*). The words there used were very likely to injure the plaintiff in his profession of a physician; but the Court held that they did not neces-

(*a*) 12 *A. & E.* 719.
(*b*) 5 *M. & W.* 249.
(*c*) 2 *A. & E.* 2. See *Wetherhead* v. *Armitage*, 2 *Lev.* 233.
(*d*) 6 *B. & C.* 154.

sarily import that the plaintiff had been guilty of adultery in the course of exercising his profession; and that the declaration ought to have connected the imputation with the profession. Here it might possibly be said that the word "guilty" indicates some evil practice: but, when we look at what follows, we see that the discourse might refer only to some inquiries which the plaintiff was led to pursue, in the course of his office, and which it could not be fit to publish.

PATTESON J. I cannot see how we are to distinguish this case from *Ayre* v. *Craven* (*a*). The language at the end of the judgment there is closely applicable here, and establishes the doctrine that, where a charge is not necessarily connected with a profession, the declaration must shew how the speaker did connect it. But here the words only declare that the speaker had seen a letter imputing that an officer of the *Leeds* police force "had been guilty of conduct unfit for publication." *Lumby* v. *Allday* (*b*), though in some respects distinguishable, rests on the same doctrine. The only difference between the present case and *Ayre* v. *Craven* (*a*) is, that in *Ayre* v. *Craven* (*a*) the declaration did not charge that the discourse was held concerning the plaintiff in his profession, or concerning the profession, but only "of and concerning the said plaintiff, so carrying on the said profession:" but then the declaration went on to say that the words were spoken "of and concerning him in his said profession;" so that really that case is on all fours with the present.

(*a*) 2 *A. & E.* 2.
(*b*) 1 *C. & J.* 301; *S. C.* 1 *Tyrwh.* 217.

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JAMES v. BROOK.

WILLIAMS J. I cannot distinguish this case from *Ayre* v. *Craven* (*a*). The word "guilty," here, might, as my Lord remarks, seem to give a character to the conduct stated to be unfit for publication: but, after all, that shews rather the view taken of the conduct by the speaker than the conduct itself. But, even if the words have a natural tendency to produce injury in the profession, the declaration is wholly wanting in any explanation of the way in which the speaker connected the conduct with the profession. That was the objection on which this Court acted in *Ayre* v. *Craven* (*a*).

Rule absolute (*b*).

(*a*) 2 *A. & E.* 2.

(*b*) See *Evans* v. *Harlow*, 5 *Q. B.* 624. Also *Le Fanu* v. *Malcomson*, in *Dom. Proc.*, 27th *June* 1848, 1 *Ho. of Lords Cases.*

Friday, May 22d.

WILLIAMS *against* STIVEN.

Before stat. 8 *Ann. c.* 14. *s.* 6., rent, accruing before the expiration of a tenancy, could not be distrained for after the tenancy expired, though the tenant continued in occupation.

Therefore, where an avowry for rent arrere is framed at common law, it must be alleged and proved that the tenancy continued up to the time of the distress.

REPLEVIN for taking plaintiff's cattle and chattels in two closes.

The defendant, besides two other pleas, avowed, for that plaintiff, for a long time, to wit two years next before and ending on a certain day, to wit 2nd *February* 1844, and from thence until and at the said time when &c., held and enjoyed the said closes in which &c., as tenant thereof to defendant, by virtue of a demise thereof to plaintiff theretofore made, at a yearly rent, to wit the yearly rent of 20*l.*, payable half yearly on the 2nd *August* and 2nd *February* in every year: and, because

the sum of 40*l.* of the rent aforesaid, for the space of two years ending as aforesaid, on &c. (2nd *February*), and from thence until and at the said time when &c., was due and in arrear from plaintiff to defendant, defendant well avows the taking &c., and justly &c., as for and in the name of a distress for the said rent so due &c.

Plea in bar. That plaintiff did not hold or enjoy the close in which &c., as tenant thereof to defendant, in manner &c.: conclusion to the country. Issue thereon. There were other issues, which it is not necessary to state.

On the trial, before *Platt* B., at the *Monmouthshire* Spring assizes, 1845, it appeared that the distress was made, in *July* 1844, for rent due for the time stated in the avowry; and evidence was given, on the part of the defendant, to shew that the plaintiff held the land as tenant to the defendant from year to year, at a yearly rent of 20*l.*, payable on the 2nd of *August* and 2nd of *February*, on which latter day the current year ended: but the plaintiff proved that he had been served, on 26th *June* 1843, by the defendant, with a notice to quit, of that date. It was hereupon contended, for the plaintiff, that his tenancy had ceased before the distress was made, and he was therefore a mere trespasser at the time of the distress, and was entitled to a verdict on the issue above mentioned. The learned Baron reserved leave to move to enter a verdict for the plaintiff on this issue, and directed a verdict for the defendant. On the other issues the plaintiff had a verdict. In *Easter* term, 1845, *Alexander* obtained a rule to enter the verdict on this issue for the plaintiff, or for a new trial. He cited *Jenner* v. *Clegg* (*a*).

(*a*) 1 *Moo. & Rob.* 213.

Whateley and *F. V. Lee* now shewed cause (*a*). In *Jenner* v. *Clegg* (*b*) the marginal note states that "a tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy." But, in that case, the rent distrained for did not become due before the tenancy expired, so that there was no right to distrain: here the tenancy did not expire till after the day on which the rent was due. The same distinction applies to *Alford* v. *Vickery* (*c*).

Alexander and *Smythies*, contrà. *Jenner* v. *Clegg* (*b*) shews that, after a notice to quit has expired, the landlord cannot affirm the tenancy by distraining, and that the tenant does not do so by continuing his occupation. Then the only question is whether a party continuing in possession after his tenancy expires is liable to have his goods distrained for rent which accrued during the tenancy. The avowry here is not framed under stat. 8 *Ann. c.* 14. *ss.* 6, 7.: and, before that statute, no right to distrain continued after the determination of the tenancy; 1 *Bro. Abr. Distresse*, pl. 19; 1 *Rol. Abr.* 672, *Distress*, (O) 8. 10. Therefore it is a material allegation, in this avowry, that the plaintiff continued tenant up to the time of the distress; which is negatived by the evidence. Without that allegation, the avowry would have been bad; *Banks* v. *Angell* (*d*), *Innes* v. *Colquhon* (*e*).

Cur. adv. vult.

(*a*) Before Lord *Denman* C. J., *Patteson* and *Williams* Js.
(*b*) 1 *Moo. & Rob.* 213.
(*c*) *Car. & M.* 280.
(*d*) 7 *A. & E.* 843.
(*e*) 7 *Bing.* 265.

Lord DENMAN C. J., in this term (*May* 26th), delivered the judgment of the Court.

Numerous points were made in this case (*a*), in which the plaintiff obtained a verdict on two issues, the defendant on the third, subject to a motion for entering a verdict for the plaintiff on that also, if the Court should think him entitled to it. The learned Baron reports that he reserved questions on evidence of the identity of the premises distrained upon, and on the defendant's right to distrain after he had given notice to quit.

On this latter point, *Jenner* v. *Clegg* (*b*) was cited; which is not applicable, because the rent there distrained for *became due* after the determination of the tenancy by notice to quit from the landlord.

But it was argued that, as the avowry here was at common law and not under the statute of 8 *Ann. c.* 14. *s.* 6., it was not good after determination of the lease by landlord's notice. And it is clear from *Co. Lit.* 47 *b.* and 1 *Ro. Ab.* 672, *Distress* (O) pl. 10, *Com. Dig. Distress* (A 2.), that this is so.

The plaintiff therefore is entitled to have the rule absolute.

Rule absolute to enter a verdict for plaintiff on the third issue.

(*a*) The report is confined to the point upon which the Court decided.
(*b*) 1 *Moo. & Rob.* 213.

Wednesday, May 27th.

The Queen *against* The Inhabitants of Ratcliffe Culey.

A parish removing paupers transmitted examinations, the first of which purported to be made touching the last legal settlement of the paupers, and to be taken by justices whose jurisdiction sufficiently appeared. In the margin were the words, "County of *Leicester*, to wit." The next examination had the same marginal words, and purported to be taken, "touching the above-named settlement," and "before us the said justices:" their names were subscribed, and were the same as those subscribed to the first examination; but there was no other statement shewing their jurisdiction.

ON appeal against an order removing *James Deeming* and his wife and son from the parish of *Melton Mowbray* to the parish of *Ratcliffe Culey*, both in *Leicestershire*, the Sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows.

The order of removal was set forth, purporting to be made by the Rev. *William Evans Hartopp*, Clerk, and *Roger Manners*, Esquire, whose names were thereunto set and seals affixed, being two of Her Majesty's justices of the peace acting in and for the county of *Leicester*. The case then proceeded: "The examinations on which the said order was founded, so far as they are material, were as follows:

"County of *Leicester*, to wit. The examination of the above named *James Deeming*, now inhabiting in the said parish of *Melton Mowbray*, touching the last legal place of settlement of himself and *Mary* his wife and *Arthur* their son aged eighteen months, taken (*a*) upon oath before us the undersigned, two of Her Majesty's

Held, that the latter examination was bad: for that each of the examinations, on which an order of removal is made, must contain in itself every statement necessary to shew jurisdiction, and the want of such statement cannot be supplied by reference from one examination to another.

(*a*) See *Regina* v. *Molesworth*, p. 65. post.

justices of the peace in and for the said county, the 3d day of *December*, 1844, at *Melton Mowbray* aforesaid: who saith" &c. (*a*). The case then set forth the rest of the examination. It was subscribed,

"*James Deeming.* Taken and sworn before us,
"*W. E. Hartopp. Roger Manners.*"

The case then, without any intervening words, set forth the next examination, which began:

"County of *Leicester* to wit. The examination of *Ann Deeming* of *Melton Mowbray* aforesaid, widow, touching the above named settlement, taken upon oath before us the said justices, the 3d day of *December* 1844, at *Melton Mowbray* aforesaid: who saith" &c. It was subscribed,

"*Ann Deeming.* Taken and sworn before us,
W. E. Hartopp. Roger Manners."

Then followed several other examinations, commencing, and being subscribed, in the same manner as that of *Ann Deeming*. The case then stated that an appeal was entered and notice of grounds served. The 6th ground, the only one material to this case, was:

6. "That the examinations of *Ann Deeming*," &c. (naming those subsequent to hers), "being examinations on which the said order was made, are severally and respectively bad in this, that it does not appear from them that they were taken or sworn before justices of the peace of or for the county of *Leicester*, or that the justices before whom they were so taken or sworn had any jurisdiction or authority to take the same."

(*a*) This examination stated *James Deeming*'s age; that he was born, as he had heard and believed, at *Melton Mowbray*, of parents then legally settled at *Ratcliffe Culey*; had never done any act to gain a settlement; was married &c., and had a son &c.; that the paupers had come to inhabit &c., were chargeable, and had received relief &c.

The case then stated that, on the trial of the appeal, the appellants moved to quash the order for the several reasons contained in the 2d, 6th and 7th grounds of appeal, contending that the order was bad (*a*) for not shewing the jurisdiction of the removing justices, and that the examinations were defective, as well because they did not contain primâ facie evidence of a settlement in the appellant parish, as because those specified in the 6th ground of appeal did not purport to have been taken before justices having jurisdiction in the matter. The sessions determined that the respondents might proceed with their case. The special case then set out the facts proved at sessions, and the decision there; and concluded as follows:

"If this Court shall be of opinion that the respondents were not entitled to be heard by reason of the objections, or any of them, hereinbefore stated, to the order of removal and examinations, or shall be of opinion that the facts proved by the respondents, or such of them as were admissible in evidence and relevant to the issue, did not amount to primâ facie proof of the pauper's settlement (*a*), both the order of sessions and order of removal are to be quashed: or, if this Court shall be of the contrary opinion upon all the above questions, both the said orders are to be confirmed."

Pashley, in support of the order of sessions. The first examination is properly headed. [Lord *Denman* C. J. No doubt.] The second refers to it by the words "before us the said justices," and is good also. [*Patteson* J. How does it appear that these words re-

(*a*) This point was discussed on the present argument, but not decided.

fer to any thing?] The examination is stated to be "touching the above named settlement," that is, the settlement mentioned in the preceding examination. It does not appear that both are not on the same paper: and the same names of justices are subscribed to both. Therefore the word "said," in the second examination, will incorporate it with the first. The principle, verba relata inesse videntur, was applied in a similar manner in *Rex* v. *Holbeck* (*a*) and *Regina* v. *Casterton* (*b*). In *Regina* v. *The Justices of Buckinghamshire* (*c*) it was objected that the respondent parish was not shewn, in the body of the order of removal, to be in *Buckinghamshire*. But *Coleridge* J. answered: "The order is addressed to the overseers of *High Wycombe* in the county of *Bucks*, and the parish is afterwards called 'the said parish of *High Wycombe*.'" The Court will not increase the rigour of the rule acted upon in *Regina* v. *Shipston upon Stour* (*d*). There it was held that the second examination did not appear to be taken before justices; but the examination made no mention of justices, and no reference, in the margin or otherwise, to a place where the examination was taken: there was nothing to connect it with a document in which the justices were correctly mentioned but similarity of names. And that case was decided, by two of the learned Judges, with hesitation. In the present case, an indictment for perjury would have lain on the second examination. If a commissioner, taking an affidavit, subscribed his name without styling himself "Commissioner," the fact might be supplied by evi-

(*a*) *Burr. S. C.* 198.
(*b*) 6 *Q. B.* 507.
(*c*) 3 *Q. B.* 800. 805.
(*d*) 6 *Q. B.* 119.

dence, on a prosecution for perjury: it would not be necessary that jurisdiction should appear by a precise averment of every fact on which it depended: this is decided, in the case of a jurat, by *Rex* v. *Emden* (*a*), cited in *Regina* v. *Bloxham* (*b*). [Lord *Denman* C. J. The decision in *Regina* v. *Bloxham* (*b*) has been remarked upon by the Court of Exchequer.] It was, in *Empey* v. *King* (*c*).

Macaulay, contrà. The examinations, even if they were on the same paper, are separate documents. There is no reference in terms from the second to the first. The word "said" does not constitute a reference to any particular document in which the justices are before named. [Lord *Denman* C. J. It may mean the justices who have convicted a poacher on that day. *Patteson* J. Taking the examination itself, it has no meaning, as to the justices: the argument is, that a meaning may be given by reference to another document, because they are in the same bundle.] If that circumstance is of any weight, the argument in support of the examination is not so strong here as in *Regina* v. *Shipston upon Stour* (*d*), where the examinations were on the same paper. *Regina* v. *Bloxham* (*b*), where this Court held that an omission in the jurat of an affidavit could not be aided by reference to a document annexed, was subsequent to *Regina* v. *Shipston upon Stour* (*d*).

Lord DENMAN C. J. I think that every examination ought to be perfect in itself, and shew the jurisdiction

(*a*) 9 *East*, 437. (*b*) 6 *Q. B.* 528.
(*c*) 13 *M. & W.* 519. See *Regina* v. *Norbury*, 6 *Q. B.* 534, note (*a*).
(*d*) 6 *Q. B.* 119.

to take it. When the descriptions furnished by a particular examination are incomplete for this purpose, we cannot admit proof for the purpose of supplying a reference to something else which may cure the defect. The justices who take an examination must appear by the examination to have authority; that is a simple rule. *Rex* v. *Emden* (*a*) has nothing to do with this case: it decides only that an indictment for perjury in an affidavit need not set out the jurat, and that it is sufficient if the place at which the affidavit was sworn be shewn in evidence. Here the question is, whether that which ought to appear on the document itself is sufficiently shewn by it or not. I wished to hear this point discussed, supposing that the case in the Court of Exchequer threw a doubt on our decision in *Regina* v. *Bloxham* (*b*): but that proves not to be so.

Patteson J. I am of the same opinion. It is best to have it fully understood that each deposition should be perfect in itself..

Williams J. The examinations are not such as the statute requires to be sent. The reference supposed to be made to another document, by the words "said justices" and "above-named settlement," does not bring the case within that class in which reference has been allowed to words in the margin, or some other part of the same paper.

Orders quashed.

(*a*) 9 *East*, 437.

(*b*) 6 *Q. B.* 528.

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Wednesday, May 27th.

The QUEEN *against* The Inhabitants of NORTHOWRAM.

By written agreement between *W.* and *B.* (*B.* not appearing to be connected with any other party to the agreement, except by its terms), of the one part, and *O.* of the other part, *W.* agreed to hire, and *O.* to be hired, for three years, to dress silk. For the first three months from the commencement of *O.*'s working under the agreement, he was to receive 10*s.* per week; after that time, to dress silk on a frame at 2½*d.* per pound for foreign waste, and 3*d.* per pound for home waste, provided he dressed seventy two pounds of foreign waste for double yarn, and sixty pounds of home waste for single yarn, per week. For all he did, over and above the said weights of waste, he should receive for foreign waste 4*d.* per pound, and for home waste 4½*d.* per pound; and for what his work averaged short of the above mentioned weights, of seventy two pounds and sixty pounds per week, he should be subjected to be deducted or abated 4½*d.* and 4*d.* per pound for each description of dressed waste deficient of the aforesaid weekly quantity. And *B.* should receive of *W.* 6*s.* per week, for superintending and instructing *O.*, in the best manner he was capable, to make him a competent workman: *B.* to be answerable for the work being done in a proper manner. *B.* was to receive 4*d.* per pound for foreign waste, and 4½*d.* per pound for home waste, for his own work, during the time of the agreement."

ON appeal against an order of two justices, whereby *Caroline Brown* was removed from the township of *Halifax* to the township of *Northowram*, both in the West Riding of *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The respondents relied upon a settlement acquired by the pauper's father, *James Brown*, by hiring and service in the appellant township. The contract of hiring of the said *James Brown*, under which the service was performed, was made by an agreement of which the following is a copy.

"Memorandum of agreement, made" &c. (7th *October*, 1825), "betwixt *Binns* and *Wrigley* and *William Bagot*, on the one part, and *William Brown* and *James Brown*, on the other part. The former agree to hire, and the latter agree to be hired, for the term of

Held: (1.) That this was a contract for the hiring of *O.*, and not an imperfect contract of apprenticeship: (2.) That it was not an exceptive hiring.

three years, to dress silk. For the first three months from the commencement of the said *William Brown* working under this agreement, he shall receive 12*s.* per week; and the said *James Brown* 10*s.* per week for the first three months. After that time, to dress silk on two frames, each at 2½*d.* per pound for what is called foreign waste, and 3*d.* per pound for what is called home waste, provided they dress seventy two pounds, each, of foreign waste for double yarn, and sixty pounds, each, of home waste for single yarn, per week. For all they do over and above the said weights of waste, they shall receive, for foreign waste 4*d.* per pound, and for home waste 4½*d.* per pound; and for what their work average short of the above mentioned weight of waste, of seventy two pounds and sixty pounds per week, they shall be subjected to be deducted or abated 4½*d.* and 4*d.* per pound for each description of dressed waste deficient of the aforesaid weekly quantity. And *William Bagot* shall receive of *Binns* and *Wrigley* 6*s.* per week for superintending and instructing them in the best manner he is capable, to make them competent workmen; the said *William Bagot* to be answerable for the work being done in a proper manner. The said *William Bagot* shall receive 4*d.* per pound for foreign waste, and 4½*d.* per pound for home waste, for his own work, during the time of the agreement."

(Signed by *Binns* and *Wrigley*, *Bagot*, and the two *Browns*.)

The appellants' counsel objected that no settlement by hiring and service could be gained under the said agreement.

If the Court should be of opinion that a settlement by

hiring and service could not be gained under the said agreement, then the order of sessions and the order of removal were to be quashed: if the Court should be of opinion that a settlement by hiring and service could be gained under the said agreement, then the order of sessions to be confirmed.

R. Hall and *Pashley*, in support of the order of sessions. The objection to the settlement is, that the contract with *James Brown* is not one of hiring and service, but an imperfect contract of apprenticeship. There appears, at first sight, to have been some fluctuation in the opinion of this Court, at different times, on this point: the soundest view seems to be that, when the primary object is instruction, the contract shall be considered as one of apprenticeship, but not when the primary object is service. The cases are collected at p. 545, &c. and p. 651, &c. of 4 *Burn's Justice* (29th ed.). In *Rex* v. *Burbach* (*a*) there was an agreement to pay the master a weekly sum for teaching; yet the contract was held to be one of hiring and service. *Rex* v. *Crediton* (*b*) will be relied upon by the appellants: but in that case the contract was, in the first instance, "to learn sawing:" and *Taunton* J. decided upon the ground that this was the primary object. The circumstance that learning is incidental to the service cannot be sufficient to shew that the relation of master and apprentice was contemplated: in all services the party serving learns something. Now here the contract is in the first instance for service: the intention of learning

(*a*) 1 *M. & S.* 370.

(*b*) 2 *B. & Ad.* 493.

appears only from the contract with *Bagot*, who is to be paid by the employer for teaching; but that is no more than the ordinary payment of a superintendent. In *Rex* v. *Nether Knutsford* (*a*), which will be cited on the other side, there was a direct contract by the employer to teach; and the ordinary terms of a contract of apprenticeship, such as keeping secrets, obeying commands, &c., were inserted. In *Rex* v. *Tipton* (*b*) the contract was that the party employed should serve *Tompson* "to learn his art," and should "be considered as an out apprentice:" yet the Court decided against the settlement by hiring and service with great doubt, and partly because they thought that the sessions, who had so decided, might have been guided by their knowledge as to the ordinary rate of wages. Here, though the wages are low, the party probably was young, and his service less valuable on that ground. There is no contract to teach, express or implied, on the part of the master. Further, the sessions having considered this to be a hiring and service, the question now is, not whether they might have found otherwise, but whether their actual decision is necessarily wrong. [Sir *F. Kelly*, Solicitor General, for the appellants, said that he should argue that the hiring, if there was any, was exceptive.] There is no exception as to time: the wages indeed vary according to the work done; but that does not make the hiring exceptive. The contract continues, whatever is done. In *Rex* v. *All Saints, Worcester* (*c*), the hiring was held not exceptive, though the party serving went where he pleased after the usual hours of work. In *Regina* v.

(*a*) 1 *B. & Ad.* 726. (*b*) 9 *B. & C.* 888.
(*c*) 1 *B. & Ald.* 322.

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Holbeck (*a*) the exception relied upon related to the time of work.

Sir *F. Kelly*, Solicitor General, *Pickering* and *Hardy*, contrà. It appears that the workmen are presumed to be incompetent. [*Patteson* J. *Bagot*'s wages are exactly the same that the *Browns* are to receive for over work, after the first three months.] That must be on the assumption that they will have become more competent workmen in the three months, and shews that their improvement was contemplated in the contract. [*Patteson* J. I do not see how either of the *Browns* could enforce any contract for teaching.] In *Rex* v. *Combe* (*b*) and *Rex* v. *Crediton* (*c*) there was no direct contract to teach; but there, as here, such a contract might arise by implication. The decision of the sessions can have no weight in the interpretation of a written agreement. In *Rex* v. *Billinghay* (*d*) this Court treated a written contract as a contract of hiring and service, quashing the order of Sessions, which assumed that it was an imperfect contract of apprenticeship: and Lord *Denman* C. J. rested his decision on the ground that there was no provision for learning or teaching: here such a provision appears. *Rex* v. *Burbach* (*e*) is clearly overruled by *Rex* v. *Crediton* (*c*): that is the view taken by *Patteson* J. in *Rex* v. *Newtown* (*g*). In the case last mentioned, a contract was held to be an imperfect contract of apprenticeship: *Littledale* J. suggested, as a test, that the master might not have been entitled to insist on employing the pauper in any other busi-

(*a*) 4 *Q. B.* 590.
(*b*) 8 *B & C.* 82.
(*c*) 2 *B. & Ad.* 493.
(*d*) 5 *A. & E.* 676.
(*e*) 1 *M. & S.* 370.
(*g*) 1 *A. & E.* 238. 243.

ness; and that is so here. [*Patteson* J. So it would have been if a fully competent person had been hired to work flannel.] In *Rex* v. *St. Margaret's, King's Lynn* (*a*), the bargain, which was not in writing, appeared to be merely the acceptance of a proposal, by a shoemaker, to take the pauper to learn his business; and this was held to be a defective contract of apprenticeship. *Rex* v. *Nether Knutsford* (*b*) is not distinguishable from the present case. Nothing can turn upon the fact that *Bagot*, who is to teach, may be a mere superintendant. The contract, as between the *Browns* and the employer, was in this respect no other than it would have been if *Bagot* had been the employers' partner. As to the question of exceptive hiring, the test is whether *J. Brown*, after performing a certain quantity of work, was at liberty to work or not, as he pleased. The case resembles *Rex* v. *Edgmond* (*c*) and *Rex* v. *Gateshead* (*d*). [Lord *Denman* C. J. I must say that, when previous cases run close upon each other, the best way is to apply the mind honestly to the one case which is before the Court. I have no doubt that this is a contract not exceptive. I regret much to see such cases reserved.] It cannot be said that any rule has been laid down which will prevent a contract, absolute in the first instance, from becoming exceptive by a subsequent qualification: *Rex* v. *Gateshead* (*d*) proves the contrary.

Lord DENMAN C. J. I need not repeat that I do not consider this an exceptive contract. As to the question,

(*a*) 6 *B. & C.* 97. (*b*) 1 *B. & Ad.* 726.
(*c*) 3 *B. & Ald.* 107.
(*d*) Note (*a*) to *Rex* v. *Byker*, 2 *B. & C.* 117.

whether it is merely an imperfect contract of apprenticeship, the Court has, in former times, seemed to treat contracts as if a hiring, which included a teaching, ceased to be a hiring under which a settlement could be gained by hiring and service. But I do not see why there should not be both a hiring and a contract to learn and teach: the one may exclude the other, but does not necessarily do so. Now here we have, first, a distinct contract of hiring. Then comes a contract that *Bagot* shall teach: but I think that the contract had a hiring in view.

Patteson J. The question as to the exception being disposed of, the remaining point is, whether this is an imperfect contract of apprenticeship. The controversy having been always upon terms in particular contracts, there may naturally appear to have been conflicting decisions. Here the parties at first agree to hire and be hired, for three years, to dress silk. Stopping there, no apprenticeship appears; nothing is said about learning or teaching. Then comes a clause by which *Bagot* is to receive so much for superintending and teaching, and to be answerable for the work. Can we from that infer that the main object of the contract was teaching? I think no such consequence follows. I do not see how *James Brown* could bring any action for not being taught. Wherever teaching and learning are the objects of a contract, though there be no perfect apprenticeship, there would be some remedy; and I can find nothing like that here. Therefore the contract must be interpreted from the earliest words; and it will be one of hiring.

Williams J. I think this case is like *Rex* v. *Billinghay* (*a*): though I agree with my Lord that the sound rule is to interpret each particular case by itself. Had that been always the mode of deciding, much fewer cases would have been sent to us. The attempt to lay down a general rule for such cases, leads only to attempts to evade it. As to the question of exceptive hiring, I will only say that, after an express contract of hiring for three years, the subsequent words must be very distinct to introduce an exception. *Rex* v. *Woodhurst* (*b*) may however be a right decision: the mention of the whole quantity of bricks to be made might perhaps be sufficient to overpower what, as a general rule, is, I think, the proper inference from a contract naming a particular time of service. As to the other point, I will merely say that, if the doctrine had been held, and acted on, that, wherever teaching was introduced into the contract, this put an end to the supposition of a contract for hiring and service, it might possibly (I say no more) have prevented all questions. In *Rex* v. *Billinghay* (*a*) it might have been contended that teaching was contemplated by the agreement: but this Court, contrary to the decision of the sessions, held the contract to be one of hiring and service.

Order of sessions confirmed.

(*a*) 5 *A. & E.* 676. (*b*) 1 *B. & Ald.* 325.

Wednesday, May 27th.

The Queen *against* The Inhabitants of the Parish of Newton Ferrers.

An order of removal, having "borough of *D.*" in the margin, reciting a complaint of the overseers of a parish in the borough of *D.*, to *R.* and *K.*, "being two of her Majesty's justices of the peace having jurisdiction within and for the said borough," and not otherwise shewing that the order was made within the jurisdiction, is bad.

And the Court quashed the order, and an order of sessions affirming it, the two being brought up by a certiorari, granted, in the first instance and without a rule to shew cause, by fiat of a Judge at Chambers.

A CERTIORARI had been obtained, upon a Judge's fiat at chambers, absolute in the first instance, to bring up, for the purpose of quashing them, an order, under the hands and seals of *Robert Rundle* and *Samuel Kerswill*, Esquires, two justices of the peace for the borough of *Devonport* in *Devonshire*, dated 22nd *February* 1845, for the removal of *Abraham West*, his wife and four children, from the parish of *Stoke Damerel* in the said borough, to the parish of *Newton Ferrers* in the said county, and an order of the *Devonshire* Quarter Sessions, made 8th *April* 1845, confirming the order of removal.

The orders having been brought up, it appeared that the original order of removal had the words "Borough of *Devonport*" in the margin, and was addressed "To the churchwardens and overseers of the poor of the parish of *Stoke Damerel* in the borough of *Devonport* in the county of *Devon*, and to the churchwardens and overseers of the poor of the parish of *Newton Ferrers* in the said county of *Devon*, and to each and every of them;" and it purported to be made "upon the complaint of the churchwardens and overseers of the poor of the parish of *Stoke Damerel* aforesaid, in the county of *Devon*, unto us, *Robert Rundle*, Esquire, Mayor, and *Samuel Kerswill*, Esquire, whose names are hereunto set and seals affixed, being two of Her Majesty's Justices of the peace having jurisdiction within and for the said

borough, and one of us of the quorum." The office and place of acting were not otherwise shewn on the document. The order of sessions purported to be made on an appeal "from and against an order lately made by *Robert Rundle*, Esquire, Mayor, and *Samuel Kerswill*, Esquire, two of her Majesty's justices of the peace for the borough of *Devonport* in this county."

Rowe, in *Michaelmas* term 1845, obtained a rule nisi to quash the several orders for insufficiency.

J. Greenwood and *Merivale* now shewed cause. The principal objection will be made to the order of removal; for the sessions were not bound, in drawing up their own order, to set forth the order from which the appeal was made so precisely as to shew the jurisdiction of the removing justices. As to the order of removal, if the words had been only "justices of the peace in and for the borough of *Devonport*," that would have shewn jurisdiction: this agrees with the explanation of the word "in" given by this Court in *Regina* v. *Stockton* (*a*); and the words "in and for" were considered sufficient in *Regina* v. *Casterton* (*b*). The addition of the words "having jurisdiction" cannot make the order bad. Some meaning ought to be attached to "within," so that it may not be taken as merely synonymous with "for." *Regina* v. *Milner* (*c*) is also an authority in support of this order of removal.

Further, the objection is not properly raised. The rule for the certiorari should have been a rule nisi; and the prosecutor should have been permitted to shew

(*a*) 7 *Q. B.* 520. (*b*) 6 *Q. B.* 507.
(*c*) 3 *Dowl. & L.* 128.

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cause. No case having been granted by the sessions, this Court will require a reason for bringing up the order. In *Corner's Practice of the Crown Side of the Court of Queen's Bench*, p. 72., the practice in obtaining a certiorari is thus set forth. "If a case has not been reserved, the application (unless on behalf of the prosecutor, or the Attorney General), is not granted of course, but some ground for the removal must be shewn, on a motion made by counsel in Court, or application to a Judge at chambers, founded upon the affidavit of the service of the notice, and such other affidavits as may be necessary" &c. "On application to the Court, a rule to shew cause only is generally granted in the first instance." "In applications at chambers in vacation, it has been the practice to grant or refuse the writ in the first instance, but as it has been decided in one case, that the fiat for the certiorari ought not to be granted out of term absolutely, in the first instance, and as in the case alluded to, a rule nisi to quash orders brought up by a certiorari so obtained, was discharged on that ground (*a*); it would not be safe to proceed in that manner, but an order nisi should be first obtained, and served in the same manner as a rule to shew cause granted by the Court." It is true

(*a*) Reference is made to *Rex* v. *Chipping Sodbury*, 3 *Nev. & M.* 104. According to the note of Messrs. *Barnewall* and *Adolphus*, a certiorari had in that case been obtained upon a Judge's fiat in vacation, without any rule nisi, for bringing up an order of sessions which quashed an order of removal "for the informality thereof," as stated on the face of the order. No case was sent up. Afterwards, in *Trinity* term 1833, *Greaves* obtained a rule nisi for quashing the order of sessions, which had been brought up together with the order of removal. In *Hilary* term 1834 (*January* 22d, before Lord *Denman* C. J., *Littledale*, *Taunton* and *Patteson* Js.), *W. J. Alexander* shewed cause, and *Greaves* was heard contrà. It was argued, in support of the rule, that no informality ap-

that Mr. *Archbold*, in his "*Practice of the Crown Office of the Court of Queen's Bench*," p. 160., says: "In *Rex* v. *Chipping Sodbury*, 3 *Nev. & M.* 104 (*a*), the Court are reported to have holden that the Judge's order in such a case, should be only an order nisi in the first instance; but they seem to have been misled into this decision by the mistaken statement of counsel in argument, that the rule, if moved for in Court, would be a rule nisi only; and the practice is otherwise." The suggestion of counsel, objected to by Mr. *Archbold*, appears to have been accurate: and it seems that Mr. *Archbold*'s account of the practice is correct only where a case is granted by the sessions. This objection to the certiorari may be taken now, as was done in *Rex* v. *Chipping Sodbury* (*a*). It would often be impossible to

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peared on the order of removal, and that therefore the order of sessions must be considered as bad upon the face of it; and, on the other side, it was contended that the rule must be discharged, because no informality appeared on the face of the order of sessions. In the course of the discussion, Lord *Denman* C. J. inquired whether there had been a rule nisi for the certiorari: to which *Greaves* answered that this was necessary only when the certiorari was moved for in Court; but that, in vacation, the certiorari issued on the fiat of a Judge in the first instance. Doubt was expressed by the Court as to the propriety of such a distinction: but, finally, the rule appears to have been discharged on the ground that, the order of removal having been quashed for informality, the respondents would not be prevented from removing again, and it was therefore not necessary for the Court to interfere.

According to the report in 3 *Nev. & M.* 104., the rule was discharged on the ground that the certiorari ought not to have been granted absolutely in the first instance.

See as to obtaining rules nisi to quash orders brought up on certiorari, and as to raising objections on certiorari which are not stated in a case, *Regina* v. *Heyop*, 8 *Q. B.* 547.; *Regina* v. *St. Anne, Westminster*, 8 *Q. B.* 561.; *Regina* v. *Hartpury*, ib. 566.

(*a*) See antè, p. 34, note (*a*).

move to quash the certiorari in proper time. [*Pashley*, *amicus curiæ*, said that in *Rex* v. *Ardsley* (*a*), in the Bail Court, *Patteson* J. had, after consideration, made the rule absolute in the first instance for a certiorari to bring up from quarter sessions an order for costs on application for an order of maintenance, objections being raised upon the face of the order of sessions.]

Rowe, contrà. As to the last point, the correct rule appears to be that stated by Mr. *Archbold*. At any rate, the Judge must have a discretion. And, further, the objection cannot be taken now: there should be a rule nisi to quash the certiorari, or else parties may be surprised by the objection. [Lord *Denman* C. J. You need not discuss that point further. If *Rex* v. *Chipping Sodbury* (*b*) be rightly reported, we are disposed to think that we did not do right there.]

As to the principal point, the order of removal does not shew that it was made within the jurisdiction. The only allegation is that the justices had jurisdiction within the borough: where the complaint or order was made does not appear. Therefore the order is bad. (He was then stopped by the Court.)

Lord DENMAN C. J. That is our opinion. *Regina* v. *Stockton* (*c*) does not interfere with our view: we there required the word "in" for the purpose of having it shewn that the order was made locally within the jurisdiction. But here the word "within" is not connected with the allegation of complaint.

(*a*) Reported at a later stage, 5 *Q. B.* 71, and note, ib. 163.
(*b*) See antè, p. 34, note (*a*).
(*c*) 7 *Q. B.* 520.

Patteson J. An ingenious attempt has been made to support the order of removal: but it is impossible to say that there is any thing to shew that the order was made within the jurisdiction.

Williams J. concurred.

Rule absolute.

The Queen *against* The Justices of Surrey.

Thursday, May 28th.

When cause is shewn against a rule for a mandamus, the Court, in the exercise of its discretion, under stat. 1 *W.* 4. *c.* 21. *s.* 6., will in general order costs to be paid by that party to the application who ultimately fails to that party who ultimately succeeds: but the rule is not invariable.

Where, however, the sessions had dismissed an appeal on a frivolous preliminary objection (namely, that the notice of appeal purported to be given not by the churchwardens and overseers, but, as the fact was, by a majority of the churchwardens and overseers acting on behalf of all), and a motion was made for a mandamus to the justices to enter continuances and hear the appeal, against which motion the respondents, and not the justices, shewed cause, and the mandamus issued and was obeyed: Held, that the respondents might properly be required to pay the costs of the motion for a mandamus and of the writ, although, in shewing cause, they had upheld the judgment of a Court, given in their favour.

The Justices of *Surrey*, at their Quarter Sessions, *July*, 1845, dismissed an appeal, by the parish of *St. Anne*, *Westminster*, against an order of removal from the parish of *Oxted* in *Surrey*, on the ground that the notice of appeal purported to be given by parties undersigned, stating themselves to be "a majority of, and acting for and on behalf of, the churchwardens and overseers" of *St. Anne*. The notice was subscribed by a person calling himself churchwarden, and four calling themselves the overseers, of *St. Anne;* and it was not denied that these were the majority of the churchwardens and overseers; but it was objected that they ought to have given the notice, not as such majority, but as "the churchwardens and overseers," so that the act should have appeared to be that of the whole

body. In *Michaelmas* term, 1845, a rule nisi was obtained for a mandamus to the Justices to enter continuances and hear the appeal. The churchwardens and overseers of *Oxted* instructed counsel to oppose the rule: cause was shewn in *Hilary* term, 1846, before *Williams* J. in the Bail Court; and counsel contended that the decision of the sessions was final, and also that it was right. The learned Judge, on *January* 31st 1846, made the rule absolute (*a*). The justices did not shew cause, or take any step in opposition to the rule. They obeyed the writ, and quashed the order of removal.

Pashley, in last *Easter* term, obtained a rule calling upon the churchwardens and overseers of *Oxted* to shew cause why they should not pay to the churchwardens and overseers of *St. Anne* the costs of and occasioned by and consequent upon the application for a mandamus, and of the writ and return, and of this application.

Baldwin now shewed cause. The justices to whom the mandamus was directed, and against whom the rule was made absolute, are the proper parties, if any, to pay the costs. The parish officers shewed cause; but that is the usual course. And this is not a case for costs. The case is like that of a new trial granted where the miscarriage is that of the Court; as on misdirection, or improper reception of evidence: there the party supporting the decision is not subjected to costs. No instance has been found in which costs under stat. 1 *W.* 4. *c.* 21. *s.* 6. have been granted in such a case as this. [Lord *Denman* C. J. *Regina* v.

(*a*) *Regina* v. *Justices of Surrey*, 3 *D.* & *L.* 573. 575.; *S. C.* 15 *L. J.* (*N. S.*) *Mag. C.* 46.

The Sheriff of Middlesex (*a*) seems to be an authority in your favour.]

Pashley, contrà. This Court will not, unless on very strong grounds, depart from the rule that costs under the statute shall be granted to the party ultimately succeeding; *Regina* v. *The Mayor &c. of Newbury* (*b*): and an exception will not be made in favour of parties opposing a mandamus to justices to hear an appeal which has been dismissed on a frivolous preliminary ground. In *Regina* v. *The Justices of the West Riding* (*c*) this Court discharged a rule calling upon parish officers to pay the costs of a mandamus by which justices had been required to alter the record of an appeal on which the officers had succeeded; but there the magistrates, not the officers, resisted the demand ultimately enforced by mandamus; and the Court, on that ground, refused to impose payment of costs on the officers, though it clearly was of opinion that they might have been subjected to costs under the statute. This case was not adverted to in *Regina* v. *The Sheriff of Middlesex* (*a*).

Lord Denman C. J. It is the general rule that on application for mandamus the costs follow the event. There is, however, a general rule which leads in an opposite direction, namely, that, where the necessity of issuing a mandamus to a court has arisen from the mistake of that court, the parties relying upon its judgment shall not pay costs. I think that we ought not to give up any part of our jurisdiction on this subject by binding ourselves absolutely to general rules;

(*a*) 5 *Q. B.* 365. (*b*) 1 *Q. B.* 751. 765.
(*c*) 5 *Q. B.* 1. 10.

though it is right that the precedents we set should, as far as possible, tend to establish certainty. In this case a frivolous objection is raised at sessions; the magistrates decide in favour of it. On motion for a mandamus to enter continuances and hear, the parties who succeeded at sessions appear in this Court, keep possession of the judgment in their favour, and put the opposing parish to the expense of enforcing the mandamus. That, I think, is a case in which we may properly exercise the discretion given us by the statute, and order those against whom the mandamus has issued to pay the costs.

Patteson J. I think the general rule which the Court has laid down as to the costs of mandamus is right; though I will not say that it is to be enforced in all cases. Here the contest was entirely between the parties to the appeal; the Justices did not interfere. The case of the unsuccessful parish has been likened to that of a party upholding a verdict obtained on the erroneous ruling of a Judge: but it must be recollected that parties sustaining the decision of a court, and failing, are not always exempted from costs. On writ of error the unsuccessful party is subjected to costs, though the Court below has been in the wrong. In the present case I see no reason why costs should not be awarded to those who were compelled to come into this Court and fight against the ruling of the sessions.

Williams J. The resistance to the mandamus in this case was an unnecessary act. The respondents could not support the ruling of the sessions without saying that in a notice of appeal all the overseers

and churchwardens must join. By coming to this Court to maintain such a proposition they occasioned all the expense consequent upon shewing cause against the mandamus: and those who created that expense ought to pay for it.

Rule absolute (*a*).

(*a*) See the next case.

[The following case may conveniently follow *Regina* v. *The Justices of Surrey.*]

The QUEEN *against* The Justices of LONDON.

[*Thursday, June* 4th.]

PASHLEY, in last term, obtained a rule to shew cause why a mandamus should not issue, commanding the justices of *London* to enter continuances and hear the appeal of the churchwardens and overseers of the parish of *Stockport*, in *Cheshire*, against an order of two justices for the removal of *George Lawson* from the parish of *St. Botolph without Bishopsgate*, in the city of *London*, to *Stockport*.

Appellants against an order of removal are entitled to enter and respite the appeal at the sessions next following the order, without giving notice, though more than thirty-five days (stat. 4 & 5 *W.* 4. *c.* 76. *ss.* 79, 81.) have elapsed between the receipt of the order and the holding of the sessions; and to have the appeal tried, upon notice at the next sessions after.

The sessions having refused to hear an appeal, because more than thirty five days had elapsed between the receipt of the order and the next session, this Court granted a mandamus, calling upon them to enter continuances and hear. And, the writ having been obeyed, costs were granted to the appellants on motion, though the respondents, in opposing the rule nisi for a mandamus, supported a judgment of the sessions in their favour; and though the appellants ultimately succeeded, not on the question of settlement, but on the omission of the respondents to send with the examinations a document referred to in them.

By the affidavits in support of the rule it appeared that a duplicate of the order, which was dated 25th *November* 1845, was received by the parish officers of *Stockport*, with copies of the examinations and notice of chargeability, on 26th *November* 1845: that the general quarter sessions for *London*, next following,

were holden on 10th of *January* 1846, and those next following on 11th *April* 1846. At the *January* Sessions the parish officers of *Stockport* moved to enter and respite an appeal; which was ordered accordingly. Notice of the appeal and grounds was served on the parish officers of *St. Botolph* on 21st *March* 1846. The paupers had been removed on 22nd *December* 1845, no notice of appeal having been then given. The appeal came on to be heard at the *April London* Sessions: when the respondents objected that it was too late, inasmuch as thirty five days had elapsed between the receipt of the order and the *January* Sessions; that the appeal ought to have been tried at those sessions; and that the sessions had now no jurisdiction. The sessions, after argument, allowed the objection, and refused to hear the appeal.

J. Payne now shewed cause. The appeal ought to have been tried at the *January* Sessions. From the 26th *November*, the day on which the appellant received notice of the order, to the 10th of *January*, the day on which the sessions were held, there were forty five days, so that the twenty one days allowed by sect. 79 of stat. 4 & 5 *W.* 4. *c.* 76. for giving notice of appeal before the pauper can be removed, and the fourteen days allowed by stat. 81 of the same statute for serving the notice of grounds of appeal, had expired. In *Regina* v. *The Justices of Lancashire* (*a*) it was held that the appeal need not be made at any sessions before the expiration of both these periods: here that limit is exceeded. [Lord *Denman* C. J. But here the appeal was entered at the proper sessions: the power of

(*a*) 4 *Q. B.* 910.

respiting has not been taken away.] It seems that the practice of respiting has been exercised without sufficient attention to the object of the legislature. By stat. 9 *G.* 1. *c.* 7. *s.* 8., if there has not been reasonable notice of an appeal, the sessions are bound to adjourn it. That was in ease of the respondents, not of the appellants: it is inapplicable where there is no question as to reasonableness of notice of trial; *Regina* v. *The Justices of Monmouthshire* (*a*). In *Rex* v. *The Justices of Cornwall* (*b*) *Patteson* J. asked: "Is there any case in which it has been held that parties were not bound to appeal, when, by the practice of the sessions, there was time enough for giving notice?" [*Patteson* J. referred to *Rex* v. *Justices of Shropshire* (*c*).] That case was decided before those which have been cited. [*Patteson* J. *Rex* v. *The Justices of Cornwall* (*b*) raises only the question whether the time of appealing may run from the removal, as well as from the order (*d*). Suppose the sessions, in their discretion, choose to respite an appeal: can a later sessions treat the respite as bad?] They might have a power of that kind, analogous to that exercised by this Court in quashing a certiorari quia improvidè emanavit.

Pashley, contrà, was stopped by the Court.

Lord DENMAN C. J. Many things have grown up in practice which we might wish to see altered: but the greatest confusion would ensue if we were to alter a course so well understood as the practice on this point.

(*a*) 3 *Dowl. P. C.* 306.

(*b*) 6 *A. & E.* 894. 898.

(*c*) 7 *East*, 549.

(*d*) See the judgment of *Littledale* J. in *Regina* v. *Justices of Salop*, 6 *Dowl. P. C.* 28. 34. And *Regina* v. *The Recorder of Leeds*, 8 *Q. B.* 623.

It has always been understood that no notice is the same thing as no reasonable notice; and that, if no notice has been given of trial at the first practicable sessions, and they are the sessions next after the order, and the appeal is then entered, the Court of Sessions is bound to adjourn it.

Patteson J. I am sorry that the question I asked in *Rex* v. *The Justices of Cornwall* (*a*) should have raised this point. When I asked it, I was not aware of the case of *Rex* v. *The Justices of Shropshire* (*b*), which decides that the justices are bound to receive and respite an appeal at the first sessions, where no notice has been given, though there was time for it. I never had the good fortune to attend sessions, and therefore was not familiar with the practice.

Williams J. concurred.

Rule absolute.

The sessions heard the appeal, and quashed the order of removal on the ground that the respondents had not sent the appellants any copy of an indenture of apprenticeship described in the pauper's examination, and on which the alleged settlement in *Stockport* depended.

Pashley, in *Michaelmas* term 1846, obtained a rule calling upon the churchwardens and overseers of *St. Botolph* to shew cause why they should not pay to the churchwardens and overseers of *Stockport* the costs of and occasioned by the application for the mandamus, and of and incidental to the writ, and the costs of this application. The affidavit on which the motion was

(*a*) 6 *A. & E.* 898. (*b*) 7 *East*, 549.

made stated that the churchwardens and overseers of *St. Botolph* shewed cause against the rule nisi for a mandamus, the justices (though served with the rule) not appearing. In opposition to the present rule the vestry clerk of *St. Botolph* made affidavit that the indenture was produced before the removing justices, and was ready to be exhibited in Court on the hearing of the appeal; and that the pauper was not settled in *St. Botolph*, but was, to the best of the deponent's information and belief, settled in *Stockport*. In *Hilary* term (*January* 30th), 1847,

J. Payne shewed cause. The dismissal of the appeal in the first instance was the judgment of a court: and the respondents might fairly and reasonably support the Recorder's decision in their favour, by resisting the motion for a mandamus. The writ was granted by this Court on the authority of *Rex* v. *The Justices of Shropshire* (*a*), which contradicts a former case (*Rex* v. *The Justices of the North Riding* (*b*)), and in which the Court adopted the ruling of a single Judge in *Rex* v. *The Justices of Buckinghamshire* (*c*). In the last mentioned case, notice of trying the appeal had been given, though not in reasonable time: in *Rex* v. *The Justices of Shropshire* (*a*) there had been no notice; the cases, therefore, are not strictly similar. [*Coleridge* J. What difference is there between no notice and notice which is not reasonable? *Rex* v. *The Justices of Shropshire* (*a*) has always been considered as overruling *Rex* v. *The Justices of the North Riding* (*b*). You are seeking to re-open the question which we decided on the motion for a mandamus.] That motion also raised a

(*a*) 7 *East*, 549.
(*b*) 3 *T. R.* 150.
(*c*) 3 *East*, 342.

question, on stat. 4 & 5 *W.* 4. *c.* 76., which the respondents might fairly litigate. And the affidavit which they now produce makes it probable that, if the appeal were heard on the merits (*a*), the settlement in *St. Botolph* would be disproved. Each party here ought to pay his own costs. Nothing has been laid down in *Regina* v. *Justices of Surrey* (*b*) which obliges the Court to decide otherwise.

Pashley, contrà. The respondents, in resisting the mandamus, upheld a frivolous objection, against the generally received practice and two decisions of the Court. The question, even if admitting of argument, was not open: for, when one sessions had permitted the appeal to be entered and respited, a subsequent sessions could not annul that exercise of jurisdiction. No unfairness is imputed to the appellants. (He was then stopped by the Court.)

Lord DENMAN C. J. I think there is nothing to take this case out of the ordinary rule. It is true that, when the appeal first came on, the respondents had the decision of a learned person in their favour: but that does not prevent the application of the rule when a mandamus is moved for, and granted after cause shewn.

COLERIDGE J. (*c*) concurred.

(*a*) It appeared, by the affidavit in support of the present rule, that the appellants, before the second hearing, gave the respondents notice of their intention to take the objection which finally prevailed, and the respondents, consequently, did not bring the pauper from *Stockport* as a witness.

(*b*) Antè, p. 37.

(*c*) *Patteson* J. was in the Bail Court.

WIGHTMAN J. I had some doubt here, because that which led to the motion for a mandamus was the mistake of a court: and I do not wish to lay down any thing on the point so as to make a precedent: but, under the particular circumstances of this case, I think the rule must be made absolute.

Rule absolute.

MILES *against* WILLIAMS.

Thursday, May 28th.

In a cause in which issues of fact and of law were joined, the plaintiff went to trial on the issues of fact, and had a verdict. The defendant obtained a new trial; and a second verdict was given for the plaintiff. The defendant again moved for a new trial; and the rule was discharged in *Trinity* term, 1844, three years after the first trial. The plaintiff, in the same term, set down the demurrers for argument; but, before the state of business admitted of the case being heard, he died. Judgment was afterwards given for the plaintiff on the demurrers, defendant not appearing.

Held, that leave might be granted to enter up judgment as of *Trinity* term, 1844, the decision of the issues in law having been delayed till the plaintiff's death by the act of the Court. And such leave was given in a cause consolidated with the former by rule of Court, and not differing from it in any material respect.

A RULE was obtained in last *Hilary* term, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign judgment nunc pro tunc as of *Trinity* term, 1844, for 17*l.* 10*s.* and the costs of this cause. The following facts appeared on affidavit for and against the rule.

The plaintiff sued as treasurer of the trustees under stat. 11 *G.* 4. & 1 *W.* 4. *c.* lxix, local and personal, public, "for building a bridge across the river *Avon*, from *Clifton* in the county of *Gloucester*" &c. The action was for calls due from the defendant as a subscriber to the undertaking, which calls the trustees sued for in the name of their treasurer, according to sect. 85 of the statute (*a*). This, and seven other actions also brought by the trustees in the name of their treasurer for calls, were consolidated by rule of Court

(*a*) The clause is set out in 3 *Q. B.* 848, note (*a*) to *Miles* v. *Bough*.

(*June* 12th, 1841). One of the actions, *Miles* v. *Bough*, in which there were issues both of law and of fact, was selected for trial; and the issues in fact were tried at the *Bristol* Summer assizes, 1841, and a verdict found for the plaintiff, subject to the opinion of the Court on certain points. A new trial was granted; and the cause was tried again at the *Bristol* Summer assizes, 1843, when a verdict was again found for the plaintiff. In the ensuing term a rule nisi was obtained for a new trial or to arrest judgment; and, in *Trinity* term (*May* 22nd) 1844, the rule was discharged (*a*). The issues in law were then set down for argument in the same *Trinity* term. On *March* 24th, 1845, the plaintiff died. In *Easter* term, *May* 2nd, 1845, the case of *Miles* v. *Bough* was called on for argument; and, no one appearing for the defendant, judgment was given for the plaintiff, and a motion was thereupon made for leave to enter up judgment for the plaintiff nunc pro tunc, as of *Trinity* term, 1844, upon the whole record. Cause was shewn in the Bail Court in *Trinity* term, 1845: and, in *Michaelmas* vacation following, *Wightman* J. gave judgment, making the rule absolute (*b*). Judgment in *Miles* v. *Bough* was signed accordingly. The agents for the plaintiff then called upon the defendant's agents in the present cause of *Miles* v. *Williams*, to consent to an order for judgment in this and the other consolidated actions; but they refused. The attorney for the defendant, in his affidavit in opposition to the present rule, deposed that he, "being advised and believing that all the said actions had wholly abated by the death of the said *Philip John Miles*, and that any further proceedings therein or in any of them

(*a*) See, as to these proceedings, *Miles* v. *Bough*, 3 *Q. B.* 845.
(*b*) *Miles* v. *Bough*, 3 *Dowl. & L.* 105.

would be erroneous and void, did not take any proceedings towards arguing the said issues in law on behalf of the said defendant *William Bough*, nor any steps to prevent judgment being given on the said issues in law, the plaintiff's attorneys having been the private solicitors to the said *P. J. Miles* and his family, and being well aware of his death; nor did this deponent, by himself or his agents, at any time after the death of the said *P. J. Miles*, receive any notice or intimation that judgment upon the said issues in law would be applied for in the said action against the said *W. Bough*: and this deponent saith that, if he had received any such intimation, he should have opposed such application."

Crowder now shewed cause. *Miles* v. *Williams*, though consolidated with *Miles* v. *Bough*, is distinct for the purpose of the present rule. The cases, however, are the same in their circumstances, and it is not denied that the resistance to this motion is, in effect, an appeal from the judgment of *Wightman* J. in the last mentioned case (*a*). Instances were mentioned there, in which judgment has been entered nunc pro tunc when two terms have elapsed after verdict, the plaintiff not being in fault. *Blewett* v. *Tregonning* (*b*) and *Evans* v. *Rees* (*c*), where many of the authorities were considered, are cases of this kind. But here the difficulty arises, not from the lapse of time after verdict, but because there were issues of law which the plaintiff had neglected to set down for argument while the issues of fact were under consideration, and which, by reason of that omission, were undecided at the time of his death. The delay, therefore,

(*a*) 3 *Dowl. & L.* 105. (*b*) 4 *A. & E.* 1002.
(*c*) 12 *A. & E.* 167.

is that of the party, not of the Court; and, where that is so, applications of this kind are not entertained: *Doe dem. Taylor* v. *Crisp* (*a*), *Lawrence* v. *Hodgson* (*b*). [*Patteson* J. Suppose the issues in law had been the only ones, and the plaintiff had not set down the demurrers for argument till *Trinity* term 1844, and had died before they could be argued: would that have precluded his representatives from entering judgment nunc pro tunc? And, at any rate, if there were issues in fact which might dispose of the cause, was the plaintiff bound to argue the issues of law in the meantime?] In the case first put, the delay of three years would bar any claim of indulgence: in the latter case the plaintiff might take his choice; but, in the event which has happened, he must abide by the consequence. [Lord *Denman* C. J. Your argument would apply equally if the party had died the moment the cause was set down. No prejudice arises here but by the plaintiff's death.] Even if there was no fault in the plaintiff, the rule of practice is that the remedy now sought shall be given only where the delay has arisen from the act of the Court. The enactment of stat. 17 *C.* 2. *c.* 8. *s.* 1., that the death of either party between verdict and judgment shall not be error, so that judgment be entered within two terms after verdict, shews the opinion of the legislature that at common law no assistance could be given where the prejudice was not caused by the act of the Court. The judgment of *Wightman* J. in *Miles* v. *Bough* (*c*) evidently assumes the necessity of such a cause (*d*). And it makes no difference in this

(*a*) 7 *Dowl. P. C.* 584.

(*b*) 1 *Y. & J.* 368.

(*c*) 3 *D. & L.* 105.

(*d*) *Crowder* read the paragraphs, pp. 108, 109, from "upon examination" to "still alive."

respect whether the death happen pending an issue of fact or an issue of law. [*Patteson* J. Your argument would lead to the conclusion that the Court were wrong in allowing the demurrer to be argued, or at least in giving judgment.] The defendant certainly considered that the action had abated, and therefore did not argue the case. [*Patteson* J. If the Court was wrong in this respect, is not it error in fact?] Then they will not now interfere. [*Patteson* J. The judgment is good while it remains unreversed.]

Butt, contrà. In *Doe dem. Taylor* v. *Crisp* (*a*) the ground for discharging the rule was that, at the time to which it was proposed to make the judgment refer, the Court had not possession of the cause, the special case not having been set down. Here the demurrers had been set down for argument before the plaintiff's death: the Court had possession of the cause; and nothing prejudiced the right of the plaintiff to recover, but the act of God. A plaintiff may always choose whether he will try issues of fact or of law first. The delay which resulted here from the trial of the issues in fact was not the plaintiff's. The defendant moved for a new trial. (*Butt* was then stopped by the Court.)

Lord DENMAN C. J. If the present difficulty were attributable merely to the act of God, the question would be different: but it has certainly arisen also from the act of the Court. The demurrers were set down for argument in the plaintiff's lifetime, but, from the state of business, could not be heard. Had it not been

(*a*) 7 *Dowl. P. C.* 584.

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for the delay so caused they would have been decided while the plaintiff lived. Before the decision, he died; that was the act of God; but that the case had not then been determined was the act of the Court.

PATTESON J. My brother *Wightman*, in *Miles* v. *Bough* (*a*), puts this matter on the right footing; and I agree in every word that he says.

WILLIAMS J. concurred.

Rule absolute.

(*a*) 3 *Dowl. & L.* 105.

Friday, May 29th. (*a*)

ROBINSON *against* HAWKSFORD.

To an action by holder against drawer of a cheque it is no answer that the cheque was not presented in reasonable time, unless, during the delay, the fund has been lost, as by failure of the banker.

ASSUMPSIT. The declaration stated that defendant, on &c., made his draft or order in writing for the payment of money, called a banker's cheque, and directed the same to the *Wolverhampton and Staffordshire Banking Company*, and thereby required them to pay plaintiff or bearer 26*l.* 19*s.*, and then delivered the same to plaintiff; and that the said Company did not pay the said cheque, although the same was then presented to them, of which defendant then had due notice, and, in consideration of the premises, he promised to pay &c. Count on an account stated.

Pleas. To the 1st count. 1. That defendant did not make his draft &c. in manner &c.: conclusion to the country. 2. That the supposed cheque was not pre-

(*a*) This and the next case have been accidentally transposed.

sented to the said Company, nor had defendant notice thereof &c., in manner &c.: conclusion to the country. 3. That, although the said cheque was presented to the said Company on a certain day and year, to wit on &c., yet defendant says that the said cheque was not then presented for payment to the said Company duly nor within a reasonable and proper time in that behalf. Verification. To the second count, Non assumpsit.

Replication to plea 3. That the said cheque was presented for payment to the said Company duly and within a reasonable and proper time in that behalf: conclusion to the country. Issue thereon. To the other pleas, similiter.

On the trial, before *Cresswell* J., at the *Liverpool* Summer assizes, 1845, a verdict was taken for the plaintiff, subject to the opinion of this Court upon a special case, which, after referring to the pleadings, went on as follows.

The plaintiff and the defendant were and are attorneys residing at *Wolverhampton* in the county of *Stafford*; and the said *Wolverhampton and Staffordshire Banking Company* were and are bankers at *Wolverhampton* aforesaid before and at, and ever since, the date of the said cheque, which was drawn by the defendant and delivered by him to the plaintiff, at *Wolverhampton* aforesaid, upon the day of its date. The following is a copy of the cheque.

"*Wolverhampton*, 13th *June*, 1845.

"*Wolverhampton and Staffordshire Banking Company.* Pay *George Robinson*, Esq., or bearer, twenty six pounds nineteen shillings on my account.

"*J. Hawksford.*

£ 26. 19*s.* 0*d.*"

Before and at, and ever since, the date of the said cheque, the said banking company were the bankers of the defendant, who kept a banking account with them. The said cheque was presented by the plaintiff to the said banking company at their bank at *Wolverhampton* for payment on 28th *June*, A. D. 1845, and was refused payment by the said banking company in pursuance of directions given them for that purpose by the defendant on the 21st day of *June* in the same year; and the said cheque remains unpaid. Upon, and ever since, the day of the date of the said cheque, the said banking company have been solvent: and, ever since the said cheque was given, a much larger sum than 26*l.* 19*s.* has been due to the defendant from the said banking company upon the balance of his said banking account with them. The defendant received no damage by the said delay in the presentment of the said cheque for payment.

At the time the said cheque was given by the defendant to the plaintiff, there was no debt due from the defendant to the plaintiff on any account; but it was given by the defendant to the plaintiff for the costs of an action of trespass brought by *John Bates Toovey* against *Thomas Honor Simkiss*, in which action the plaintiff was the attorney of the said *T. H. Simkiss*. Upon receiving the said cheque the plaintiff gave to the defendant a receipt for the amount in the following words: "*Toovey* v. *Simkiss*. Received of defendant, by payment of Mr. *John Hawksford*, the sum of 26*l.* 19*s.*, the costs in this action. *G. Robinson*."

It is agreed that the Court may draw any such inferences as the jury ought to have drawn if the facts above stated had been proved before them; and that the

Court are to direct in what manner the several issues are to be entered: or, if the said Court shall so think fit, they may direct the verdict to be vacated and a nonsuit, or verdict for the defendant, entered.

Cowling, for the defendant, was called upon by the Court. This action is not brought on the consideration of the cheque, but simply on the promise to pay, implied by the instrument itself. A cheque is understood to be an order for immediate payment; Lord *Tenterden* treated it as an equivalent to such an order, in *Smith* v. *Ferrand* (*a*). [Lord *Denman* C. J. Convenience has established a rule as to presentment; but, when you say that the cheque was presented at an unreasonable time, it lies on you to shew facts which make the time unreasonable.] In *Alexander* v. *Burchfield* (*b*) a cheque delivered on the 10th of *March* was paid in on the 12th; and *Tindal* C. J. (after evidence of the practice as to presentment) told the jury that he thought the presentment too late, unless they found that the defendant had dispensed with an earlier presentment: and, a verdict being found for the defendant, the Court of Common Pleas, on motion for a new trial, upheld the ruling. It is true, however, that the bankers, in that case, had stopped payment. [Lord *Denman* C. J. Yes; and therefore it became necessary to inquire whether the presentment was in reasonable time. *Patteson* J. Does the drawer of a cheque undertake to pay in any given time? I think the holder is only bound to present so as to avoid any prejudice that might arise from the drawee becoming insolvent. If the presentment were a year

(*a*) 7 *B. & C.* 19. (*b*) 7 *M. & G.* 1061.

after the date, that alone would not warrant the drawer in telling the banker not to pay.] In *Moule* v. *Brown* (*a*) presentment at a bank in *Bath* the next day but two was held too late, though the bankers had not become insolvent. *Park* J. cited *Boddington* v. *Schlencker* (*b*) as shewing that a cheque should be presented the day after it is received. A distinction was attempted on the ground that the cheque there was a *London* one: but *Tindal* C. J. said: "The result of the cases, from *Rickford* v. *Ridge* (*c*) to *Boddington* v. *Schlencker* (*b*), is, that the party receiving a cheque has till the following day to present it, where there are the ordinary means of doing so. Here, the plaintiffs resided in a post town, and if they had transmitted the cheque to *Bath* by the next day's post, it would have been presented on *Thursday*. If there was any sufficient reason for not pursuing that course, it lies on them to shew it." *Park* J. said: "The cases are uniform that the presentment of the cheque should not be delayed beyond the next day:" and *Vaughan* J. added: "That rule was laid down in *Rickford* v. *Ridge* (*c*), where Lord *Ellenborough* said, 'the rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable that cheques received in the course of one day should be presented the next.' If any other rule were adopted, it would be difficult, if not impossible, to draw the line." The question, what is reasonable time, is to be considered with reference to the person who has to present: he must present the next day unless there are circumstances which excuse him. Here none

(*a*) 4 *New Ca.* 266.
(*b*) 4 *B. & Ad.* 752.
(*c*) 2 *Camp.* 537.

appear. All the parties lived in the same town. It would be a very inconvenient practice that the holder of a cheque should have liberty to present it a fortnight or a year after he received it. He ought not to complain if in such a case he loses his remedy on the cheque, and is obliged to sue on the consideration. [*Patteson* J. *Moule* v. *Brown* (*a*) was not an action against the maker; and no one said that an action would not have lain against him. But, as between subsequent parties, a third person passing the cheque had a right to expect that the person taking it from him should present in reasonable time. *Serle* v. *Norton* (*b*) is a direct authority against you.] The ruling of the Judge is so; but the plea to which it referred was rendered immaterial by the verdict on other pleas. [Lord *Denman* C. J. The ruling amounts to a clear opinion from Lord *Abinger;* the very best opinion on such a subject that ever was in *Westminster Hall*. There is a very sensible note upon the case in *Moody & Robinson* (*c*).] The cases shew a custom in *London;* and a similar one ought to prevail in the country. It is important to the convenience of the drawer: when he delivers the cheque he may have money at his banker's to meet it; but in a week he may want to take the money away. [Lord *Denman* C. J. Then he would be a very dishonest person. If the rule be "first come first served," that might take effect in an hour as well as in a week. *Patteson* J. If the bank continues solvent, I do not see what harm it does the drawer of the cheque that his money should lie there a year instead of being drawn

(*a*) 4 *New Ca.* 266.

(*b*) 2 *M. & Rob.* 401. *S. C.*, in Banc (not *S. P.*), 9 *M. & W.* 309.

(*c*) 2 *M. & Rob.* 404. note (*a*).

out by the holder. Lord *Denman* C. J. No rule is more simple than that, things continuing the same at the bank, the drawer of the cheque remains liable upon it.]

Unthank, contrà, was not heard.

Lord DENMAN C. J. Where a loss has occurred by the cheque not being presented, it is necessary to inquire if there was any unreasonable delay: and the loss itself would be some evidence of that fact. In *Down* v. *Halling* (*a*), where the defendants had taken a cheque six days old, and received payment at the banker's, the date was considered as a circumstance of suspicion, among the other matters in evidence, but it was not suggested that the drawer's liability had ceased. In the present case no suspicion is raised. Lord *Abinger*, in *Serle* v. *Norton* (*b*), was not distinguishing between *London* and country notes, but between cases where, from the circumstances, a particular rule as to reasonableness becomes applicable, and cases where such rule does not apply. Under ordinary circumstances, the only rule is that, if things have continued the same, and no damage has arisen from delay of presentment, the drawer continues liable.

PATTESON J. It would be very inconvenient that the drawer of a cheque should be entitled, if it were not paid in two days, to countermand payment at the banker's. It is suggested that the holder might sue on the consideration; but I do not know that he could, if

(*a*) 4 *B.* & *C.* 330. (*b*) 2 *M.* & *Rob.* 401

he had vitiated the cheque by delay in the presentment. *Moule* v. *Brown* (*a*) is distinguishable from this case on the ground already pointed out. As between the drawer of a cheque and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemed unreasonable: but, if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years.

WILLIAMS J. If the question arises, who is to be the loser when the banker becomes unable to pay, the point is properly raised whether the cheque was presented in due time: but, if things remain the same, the cheque is still a cheque, and the money is money applicable to the payment; and I cannot conceive that the rule as to time applies.

Judgment for plaintiff.

(*a*) 4 *New Ca.* 266.

Thursday, May 28th.

GORDON *against* LAURIE and Another.

Under stat. 32 *G.* 2. *c.* 28. *s.* 1., a sheriff's officer making an arrest must not carry the party to prison within twenty four hours, unless such party has first been informed that he may, if he will, be carried to a safe and convenient dwelling house of his own nomination, and has refused to nominate. And it is not a refusal, if the party, without being so informed, asks if he may go to a spunging house, and, being told that there are none, makes no further proposal, and suffers himself to be taken to one of two prisons previously named by the officer.

DEBT on stat. 32 *G.* 2. *c.* 28. sects. 1, 12. The first count of the declaration recited a capias at the suit of *Henry Bath*, directed to the sheriffs of *London*, requiring them to take plaintiff and keep him until he should have given them bail or made deposit &c.; an it alleged that defendants, being sheriffs, executed the writ and arrested plaintiff, "and, under and by virtue of the said writ, carried the plaintiff, so arrested, and in the custody of the defendants as such sheriffs as aforesaid, to a certain gaol or prison called, to wit, the Debtors' prison, *White Cross Street*, in and for the city of *London* and the county of *Middlesex*, within twenty four hours from the time of the said arrest, without the free and voluntary consent of the plaintiff, though he the plaintiff did not refuse to be carried to a safe and convenient dwelling house of his own nomination or appointment within the said city of *London;* contrary to the form of the statute in such case" &c.; whereby, and by force of the statute &c., defendants forfeited and became liable to pay for the said offence to plaintiff, being the party thereby aggrieved, the sum &c. Nonpayment averred, to plaintiff's damage &c. There was

In an action for penalties under the statute, the declaration alleging that plaintiff was carried to *Whitecross Street* prison without his free and voluntary consent, although he did not refuse &c., to which Not guilty was pleaded; the evidence being that plaintiff went to prison under the circumstances above stated; and there being proof that he went there for the purpose of enabling himself to recover damages; particularly, that he had told his creditor after the arrest that if an arrangement were declined he would go to *Whitecross Street* prison: Held, that the Judge directed the jury properly on the issue joined, by desiring them to say whether plaintiff went to prison for want of being informed of his right to go to a house of his own nomination, or whether he elected, for purposes of his own, to go to prison.

a second count, for carrying plaintiff to the private house or offices of the sheriff's officers, without plaintiff's consent, contrary to the statute.

Plea, Not guilty. Issue thereon.

On the trial, before Lord *Denman* C. J., at the sittings in *Middlesex* during this term, the plaintiff proved that he was arrested under a capias and Judge's order, and taken, with his own consent, to the office of *Whittle* and *Hildyard*, the sheriff's officers, where he sent for his brother, and endeavoured to arrange a settlement with the creditor. The plaintiff requested *Hildyard* to allow him to remain in the office till the business could be arranged; but *Hildyard* said that he should be obliged to close the office, and that plaintiff must go either to *White Cross Street* Prison or the Queen's Bench. When the time for closing the office came, no settlement having been effected, the plaintiff asked whether there was any private house or spunging house to which he could be taken. The officer said that all those houses had been given up: and the plaintiff was then taken to *White Cross Street* Prison. The defendants endeavoured to shew that the plaintiff had voluntarily gone to prison for the purpose of obtaining damages in an action for the arrest: and they proved a letter, written by him from *Hildyard*'s office to the creditor's attorney, containing the words: "If you will not arrange, I intend to go to *White Cross Street* prison immediately, as the officer will not allow me to remain here." Lord *Denman* C. J. stated to the jury, in summing up, that the officer's duty was not to carry the party to prison within twenty four hours of the arrest without informing him that he had the option of going to a dwelling house of his own nomination according to the statute; but he left it to the jury to say,

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whether the plaintiff had gone to prison for want of being so informed, or whether he had made a clear and positive election, for purposes of his own, and for the sake of damages, to go to prison. The jury were of opinion that the plaintiff did not voluntarily elect to go to prison: and they found a verdict for the plaintiff on the first count, leave having been reserved to move to enter a nonsuit as after mentioned.

M. Chambers now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had on the ground of misdirection. The question arises on stat. 32 *G.* 2. *c.* 28. *s.* 1., which enacts that no sheriff or officer "shall carry" any person arrested by him "to any gaol or prison within four and twenty hours from the time of such arrest, unless such person or persons, so arrested, shall refuse to be carried to some safe and convenient dwelling house of his, her, or their own nomination or appointment, within a city, borough," &c., "in case such person or persons shall be there arrested" &c. The plaintiff did in fact refuse; for he nominated a place to which he could not be taken, and, being apprised of that, went to *White Cross Street* prison. On this point, which was taken at the trial, a nonsuit ought to be entered. At any rate, the Lord Chief Justice misdirected the jury in suggesting that they might find for the plaintiff if they thought that he went to prison for want of being informed that he might go to a house of his own nomination. It is, indeed, laid down, in *Simpson* v. *Renton* (*a*), and in *Dewhirst* v. *Pearson* (*b*), which was cited at the trial, that the party arrested cannot be

(*a*) 5 *B.* & *Ad.* 35. (*b*) 1 *Cro.* & *M.* 365. *S. C.* 3 *Tyr.* 242.

said to "refuse" within the meaning of the statute, unless the officer states to him his right of option, and asks him to nominate a place. In neither of those cases was reference made to *Pitt* v. *The Sheriff of Middlesex* (*a*) (in a cause of *Hamilton* v. *Jones, Pitt and Another*), where *Pitt* moved for an attachment against the sheriff under the clause now in question, merely stating in his affidavit that the officer had taken him immediately to the *Fleet* Prison; and the Court of Common Pleas said: "The defendant *Pitt* has not brought himself within the provision of the act. He should have named some safe and convenient dwelling house, within the liberty in which he was arrested, whither the officer was to convey him. How otherwise could the officer judge of the safety or convenience of the place?" And, in the present case, the plaintiff did, in fact, consent to go to *White Cross Street* Prison; and it was an essential part of the issue, whether he did or did not go there "without" his "free and voluntary consent." If he, in point of fact, did consent, it was immaterial whether the officer informed him of his rights or not. In giving such consent he must be supposed to have known the law. The question of actual consent ought not to have been mixed up with the question of being informed as to the right of option. [Lord *Denman* C. J. I put it to the jury whether he did not for his own purposes choose to go to prison. If he did, it was difficult to say that he did not go voluntarily.]

PATTESON J. I think the direction in this case was right. This Court decided, in *Simpson* v. *Renton* (*b*),

(*a*) 4 *Moore & P.* 726. (*b*) 5 *B. & Ad.* 35.

and the Court of Exchequer in *Dewhirst* v. *Pearson* (*a*), that the officer ought to inform the party arrested of his right of option. Here that was not done. The plaintiff asked: "May not I be taken to a spunging house?" But that was not naming a place and refusing to go elsewhere; it was only an inquiry whether he could be taken to such a house. Before being carried to prison he should have been told distinctly, "you may name a place yourself, to which you wish to be taken." As to the voluntary consent; it was left to the jury to say whether the plaintiff preferred, for his own purposes, going to prison, and they thought that he did not. His naming *White Cross Street* was only a choice between two prisons which had been mentioned (*b*). In *Silk* v. *Humphery* (*c*), where the plea stated a consent in the first instance to go to a particular dwelling house, it was expressly averred that "the defendants, at the time of the arrest, informed the plaintiff that she might be carried to a safe and convenient dwelling house" &c.

WILLIAMS J. The mention of a spunging house, as proved here, had not even the aspect of nominating a place for the purpose of being carried there. It is fit that the party arrested should be informed of his right of option before he is conveyed to prison. On the authority of the cases, I think there is no ground for a nonsuit. As to the other point, the question whether the plaintiff went to prison of his own accord was put favourably to the defendants; and the verdict declared that there was no assent on his part.

(*a*) 1 *Cro. & M.* 365. *S. C.* 3 *Tyr.* 242.
(*b*) See *Barsham* v. *Bullock*, 10 *A. & E.* 23. 25.
(*c*) 4 *A. & E.* 959.

Lord DENMAN C. J. The principle, that every one is supposed to know the law, does not apply in this case. Under the statute, a person taken by the sheriff's officer ought to be told of the option which the law gives him. It is important to say that we adhere to the cases which lay it down as the duty of the officer to give that information. The statute does not state this in express words; but the meaning is clear.

Rule refused.

The QUEEN *against* The Inhabitants of MOLESWORTH.

Saturday, May 30.

ON appeal against an order of two justices, whereby *Isabella Mantle* and her four children were removed from the parish of *Bythorn* to the parish of *Molesworth*, both in *Huntingdonshire*, the sessions confirmed the order, subject to the opinion of this Court on a case which, so far as material to the point decided by this Court, was as follows.

On 22d *March* 1845, *Thomas George*, then, continually since, and still, being one of the overseers of the poor of *Bythorn*, made and exhibited a complaint in writing before the said two justices, which was in the words following.

"*Huntingdonshire*, to wit. The complaint of *Thomas George*, one of the overseers of the poor of the parish

The examinations taken before removing justices were headed, "*Huntingdonshire* to wit. The examination of" &c., "at present residing" &c., "taken on oath, this 22d day of *March*, 1845, before us, two of Her Majesty's justices of the peace in and for the said county, touching the place of the last legal settlement of" *M.* Held that the order of removal founded thereon was bad, the examinations shewing no jurisdiction, as it did not appear on the face of them that they were taken on a proper complaint.

Although, in a case stated by the Sessions for this Court, it appeared to have been proved, on the trial of the appeal, that a complaint was duly made, and that the examinations were taken, and order made, on the hearing of such complaint.

of *Bythorn*, in the said county of *H.*, made on behalf of the churchwardens and overseers of the poor of the said parish of *B.*, and with their assent, unto us, the undersigned, two of her Majesty's justices" &c. The complaint was then set out: and it stated that *Isabella Mantle* and her children had come to inhabit, and were inhabiting, in *Bythorn*, and were endeavouring to settle there, not having gained a settlement, nor produced a certificate; and that, on &c., they became chargeable to, and were now receiving relief from, *Bythorn*: and it prayed that *Isabella Mantle* might be examined as to the place of her legal settlement.

"Exhibited before us, the day and year first above written."

Signed by the removing justices, and by *Thomas George*.

The order of removal was made on the same 22d *March*, after the making, taking, exhibiting and hearing of the said complaint, and the examinations hereinafter mentioned, by the said justices; and was in the following form.

"To the overseers of the poor of the parish of *Bythorn*, in the county of *Huntingdon*, and to the overseers of the poor of the parish of *Molesworth*, in the county of *Huntingdon*, and to each and every of them. *Huntingdonshire*, to wit. Whereas complaint hath been made unto us, whose names are hereunto set and seals affixed, being two of her Majesty's justices of the peace in and for the said county of *Huntingdon* (one whereof being of the quorum), by *Thomas George*, on behalf of the churchwardens and overseers of the poor of the said parish of *Bythorn*, that *Isabella Mantle*" &c. (stating the complaint). The order went on and concluded in the

usual form, adjudging the premises to be true, and ordering the removal from *Bythorn* to *Molesworth*.

Thomas George, in the order mentioned, is the person by whom the complaint was made and exhibited. He was, before and at the respective times of the making and exhibiting of that complaint and of the said order and of the several examinations upon which the same was made, one of the overseers of the poor of *Bythorn*. That complaint was made and exhibited by him, as aforesaid, with the sanction and authority, and at the request and on behalf, of the churchwardens and overseers of that parish; and the complaint, recited in the order, is the same complaint so made and exhibited by him as, and being, such overseer and authorized and requested as aforesaid: and it was so made and exhibited by him, on the 22d *March*, to and before the same two justices who took the said examinations and made the said order, and at the same meeting of such justices at which such examinations were taken and such order made.

One of the examinations, upon which the order of removal was made, is that of *Isabella Mantle*, the pauper, which was as follows.

"*Huntingdonshire*, to wit. The examination of *Isabella Mantle*, at present residing in the parish of *Bythorn* in the said county, widow of *Samuel Mantle*, deceased, taken on oath this 22d day of *March*, A. D. 1845, before us, two of her Majesty's justices of the peace in and for the said county, touching the place of the last legal settlement of her, the said *Isabella Mantle*, and her four children." (Then followed her evidence.)

"Taken and sworn, at *Huntingdon*, in the said county,

before us, the same having been first read over to and explained to examinant."

(Signed by the two justices, and with the mark of *Isabella Mantle.*

The captions of all the examinations were in the same form.

Copies of the order and examinations (including the complaint), with notice of chargeability, were duly sent by the overseers of *Bythorn* to the overseers of *Molesworth.*

The case set out the grounds of appeal, upon which it was not disputed that the question decided by this Court was raised. Upon the appeal coming on for trial, service of the notice and grounds of appeal was admitted: and thereupon, before any evidence was heard, the appellants' counsel contended that the order should be quashed upon this objection, among others, "that the captions of the examinations did not, nor did any or either of them, shew that they were taken upon the complaint of the churchwardens and overseers of the parish of *Bythorn.*"

The respondents contended that the complaint was sufficiently averred and recited, and that they were entitled to refer to the complaint, the original of which was before the Court of Quarter Sessions on the trial of the appeal, inasmuch as *T. George,* mentioned in the order, was in fact one of the overseers of *Bythorn* at the time the complaint and order were respectively made and the examinations taken, and such complaint was made by the authority and on behalf of the churchwardens and overseers of *Bythorn.* The appellants contended that this could not be done.

The sessions, after argument, overruled all the objec-

tions; and, after hearing evidence, confirmed the order of removal with costs, subject to the opinion of this Court upon the validity of the objections. If the Court should be of opinion that the sessions ought to have quashed the order of removal upon any of the objections, the order of removal and the order of sessions were to be quashed, otherwise to be confirmed.

Burcham, in support of the order of sessions. The examinations appear, by the captions, to be taken touching the legal settlement. But no examinations could be so taken except upon a complaint duly made. The legal intendment, therefore, is that they were taken on such a complaint: and, in fact, the case shews that they were so taken.

Worlledge, contrà, was stopped by the Court.

Lord Denman C. J. The objection to the captions is quite fatal. The only argument in favour of them is, that it would have been illegal for the magistrates to act except upon a legal complaint. Such an answer would be applicable to any objection made to an act of magistrates on the ground that jurisdiction was not shewn.

Patteson and Williams Js. concurred.

Order of sessions quashed (*a*).

(*a*) See *Regina* v. *Ratcliffe Culey*, antè, p. 18. The correctness of the above decision was afterwards questioned in *Regina* v. *The Inhabitants of Sheffield* and several other cases, in which the Court, after time taken for consideration, gave judgment in *Trinity* vacation (*July* 12th) 1848, and stated that (*Erle* J. dissentiente) they adhered to the decision in *Regina* v. *Molesworth*.

See stat. 11 & 12 *Vict. c.* 31. Sects. 1, 2, 3.

Saturday, May 30th.

The QUEEN *against* The Inhabitants of HOLNE.

On application for an order of removal, the justices, besides the witnesses produced on behalf of the removing parish, examined others at the request of an attorney who appeared for the parish to which the removal was to be made. This last evidence was not transmitted with the other examinations, nor taken down in writing.

Held that stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79. was sufficiently complied with by sending the other examinations.

Where a pauper is bound apprentice under stat. 56 *G.* 3. *c.* 139., it is sufficient, under sect. 2, if a notice of the intended binding, directed generally to the overseers of the parish into which the apprentice is to be bound, is served on one of such overseers.

ON appeal against an order of two justices, removing *Mary Honeywell* and her bastard child from the parish of *Buckfastleigh* to the parish of *Holne*, both in *Devonshire*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The material grounds of appeal were as follows.

"Because a copy of all the examinations touching the settlement of the said paupers, taken by the said justices previous to the signing of the said order, was not sent to us" &c.

"Because a copy of all the evidence touching" &c. (as before).

"Because the four persons hereinafter mentioned, namely" &c. (four witnesses named), "were severally sworn and examined, by and before the said justices, previous to their making the said order touching the legal place of settlement of the said *Mary Honeywell* and her bastard child; but the evidence given by them on oath before the said justices, touching" &c., "was not reduced into writing, as it ought to have been: and because no copy of the evidence or examination of the said" &c. (the same witnesses) "touching" &c., "taken by and before the said justices, was sent to us" &c.

"That the said *M. H.* did not acquire a settlement in our said parish of *Holne*, by apprenticeship" &c., "under the alleged indenture of apprenticeship, dated" &c., mentioned in the examination on which the said

order of removal was made" &c.; "because, previous to the allowing and signing of the said alleged indenture by the justices who are alleged to have allowed and signed the same, the provisions of the statute 56 *G.* 3. *c.* 139. *s.* 2. were not complied with."

"That the said *M. H.* did not acquire a settlement" &c., "because, previous to her being bound" &c., "and previous to the alleged allowance" &c., "no notice was given to the then overseers of the poor of our said parish of *Holne*, in which parish the said *M. H.* was intended to serve an apprenticeship, of such intended binding."

The paupers were removed on the following, among other, examinations.

A witness proved the execution of an indenture, dated 30th *August* 1834, by which the pauper, *Mary Honeywell*, was bound apprentice, by the parish officers of *Buckfastleigh*, to *George Waycott* of the parish of *Holne*, its allowance by two justices, and the order for binding. *George Waycott* aforesaid proved service and residence under the indenture, in *Holne*.

Copies of both these examinations, with those of all the other witnesses examined on the part of the removing parish, were sent to the parish officers of *Holne*, according to stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79.

In support of the 1st, 2d and 3d grounds of appeal, it was proved, at the trial, that, when these examinations were taken, an attorney, who appeared on behalf of the parish of *Holne*, stated that he had certain witnesses present, whom he wished to be examined, to prove that the parish officers of *Holne* had not received notice of the binding pursuant to stat. 56 *G.* 3. *c.* 139. *s.* 2.: and the four witnesses mentioned in the grounds of objection, who were examined at the trial of the ap-

peal, stated that they were present at the taking of the examinations; that they were, at the request of the said attorney, sworn and examined by the removing justices previously to their making the said order; that two of them gave evidence before the removing justices that they were churchwardens, and another that he was overseer, of *Holne*, at the time of the binding; that neither of them had received any notice of the said binding, nor attended at the said binding, nor were in any way aware that it was about to take place, before it was actually completed. The fourth gave evidence that he was the son of *William Waycott*, who was overseer of *Holne* at the same time; that he was in the habit of transacting parish business for his father, and received notice of an intended binding of *Mary Honeywell*, to take place on 9th *August*, but had no recollection of acquainting his father with it, and neither he nor his father attended at the binding.

The evidence of these four persons was not reduced to writing, when given before the justices; nor did it form any part of the examinations, signed by the justices, upon which the order of removal was made; and no copy or note of the examination of these persons was sent by *Buckfastleigh* to *Holne*.

This objection was taken by the appellants at the trial of the appeal, but overruled by the Court.

On the trial of the appeal, the above evidence was given: but, on the part of the respondents, *William Waycott*, another son of *William Waycott*, the overseer of *Holne* in 1834, was called, and proved that his father had been served with a notice, directed to the overseers of *Holne*, of the intended binding, and that such notice had been proved before the allowing justices at the binding.

The appellants objected that no sufficient notice was proved to have been given to the parish officers of *Holne* of the intended binding. The Court overruled this objection also, and confirmed the order.

The questions for the opinion of this Court were: 1. Whether it is a sufficient ground of appeal, under the circumstances stated, that the examinations of the four witnesses named in the grounds, were not reduced to writing, and no copy of them was sent to the appellants. 2. Whether notice of the intended binding, delivered to one of the overseers of *Holne*, but directed to the whole body of the parish officers, is a sufficient notice under stat. 56 *G.* 3. *c.* 139. *s.* 2. If the Court shall decide the first question in the affirmative, or the second in the negative, the order of sessions to be quashed: if otherwise, to be confirmed.

J. Greenwood, in support of the order of sessions. First, the justices were not bound to receive evidence from the appellant parish; nor was it necessary to reduce such evidence, when received, to writing. The hearing before the removing justices is not a hearing of adverse parties; the removal is made only on the evidence of the respondent parish. Therefore no argument can here be drawn from *Regina* v. *Outwell* (*a*); for there the decision was only that the justices are to take down and send all the evidence upon which the removal is made; and that is the provision of sect. 79 of stat. 4 & 5 *W.* 4. *c.* 76. The language of *Patteson* J. in *Regina* v. *Black Callerton* (*b*) goes no farther. Secondly, the notice, directed generally to the overseers of the appellant parish, and served upon one of them, satisfies

(*a*) 9 *A.* & *E.* 836. (*b*) 10 *A.* & *E.* 679.

the enactment of of stat. 56 *G.* 3. *c.* 139. *s.* 2., that "notice shall be given to the overseers of the poor of the parish or place" into which the child is to be apprenticed. Service on one is service on all: it will be presumed that they are in communication one with another. This view is supported by *Rex* v. *The Justices of Staffordshire* (*a*), *Rex* v. *The Justices of Warwickshire* (*b*), and 2 *Nolan's P. L.* (4th ed.) 527, note (5), there cited.

Merivale, contrà. First, sect. 79 of stat. 6 & 7 *W.* 4. *c.* 76., by directing that "a copy of the examination" upon which the order is made shall be "sent," by implication requires that all the evidence shall be taken in writing (*c*). Now, if the removing justices have chosen, at the hearing, to receive evidence from the parish to which the pauper was removed, that constitutes an "examination upon which such order was made" equally with evidence offered from the other side. It is true that the parish to which the removal is made may be expected to be in possession of the evidence tendered by themselves: but that, at the utmost, is only a reason why the legislative provision might have been made less extensive. Probably the legislature did not contemplate the occurrence of such a case. Even matter which never is taken down, such as documents, must be sent. The omission, it may be said, is that of the justices, not of the respondent parish. But it renders the act of the justices illegal, and therefore may be objected to on appeal against their act. Secondly, notice to one parish officer is generally sufficient: but here the language of the statute is peculiar. Notice is to be "given to the

(*a*) 4 *A.* & *E.* 842. (*b*) 6 *A.* & *E.* 873.
(*c*) See *The Earl of Harborough* v. *Shardlow*, 7 *M.* & *W.* 87.

overseers"; and the notice must be proved before the justice signs the indenture, "unless one of such overseers shall attend such justice, and admit such notice." It was intended that every possible precaution should be taken; and on this ground, in *Rex* v. *Threlkeld* (*a*), it was decided that the notice must be given though both the parishes be in the same county and jurisdiction of the peace.

Lord Denman C. J. There can be no doubt that the service of notice is good. As to the other point, I am of opinion that the order of removal cannot be said to have been made upon the evidence given on behalf of the appellant parish.

Patteson J. If this had been evidence tendered on behalf of the removing parish, I am far from saying that the removing justices would have had any discretion as to taking it down or not. But here it comes from the other side, and is not taken down, because the order is not made upon it. As to the other point, the service of the notice was clearly good.

Williams J. How could the parish, from which the removal was made, compel the removing justices to take down evidence given by the other parish? Yet are they, because they cannot do this, not to obtain the order of removal? I think that the order is not made on that evidence.

Order of sessions confirmed.

(*a*) 4 *B. & Ad.* 229.

Saturday, May 30th.

The QUEEN *against* The Inhabitants of SAFFRON WALDEN.

Stat 4 & 5 *W.* 4. *c.* 76. *s.* 68. enacts that no person shall retain a settlement, gained by possessing an estate or interest in a parish, for a longer time than he shall inhabit "within ten miles thereof."

Held, where the pauper resided out of the parish, that these words mean ten miles measured in a direct line from the residence to the nearest point of the parish.

ON appeal against an order of two justices, whereby *George Reynolds*, his wife, and children, were removed from the parish of *Saffron Walden* to the parish of *Arkesden*, both in *Essex*, the sessions quashed the order, subject to the opinion of this Court on the following case.

George Reynolds, the pauper, was originally settled in *Arkesden*, above mentioned: he subsequently acquired a settlement by estate in the parish of *Furneux Pelham*, in *Hertfordshire*, by possession of and residence on some land, his own property, in that parish. At the time of his removal, under the above mentioned order, he no longer inhabited on the said land in the parish of *Furneux Pelham;* nor did he any longer inhabit the last mentioned parish: but he inhabited a house in the parish of *Saffron Walden*, to which last mentioned parish he then was chargeable. From the boundary of the parish of *Furneux Pelham*, to the said house which the pauper was inhabiting in *Saffron Walden*, the distance is ten miles and a quarter, by the nearest mode of access: but, measured in a straight line on a horizontal plane from such boundary to such house, the distance is but nine miles. From the boundary of the estate and land, above mentioned, in the parish of *Furneux Pelham* to the house so inhabited by the pauper in *Saffron Walden*, the distance is more than ten miles by the nearest mode of access: but, measured in a

straight line, the distance is but nine miles. And, from the boundary of the parish of *Furneux Pelham* to the boundary of the parish of *Saffron Walden*, the distance by either of the above modes of measurement is less than ten miles.

If the Court should be of opinion that the pauper, at the time of the making of the order of removal, still retained his settlement in *Furneux Pelham*, the order of sessions was to be confirmed: if the Court should be of opinion that the pauper no longer retained that settlement, the order of sessions to be quashed.

M. Chambers and *Wordsworth*, in support of the order of Sessions. The question arises on sect. 68 of stat. 4 & 5 *W.* 4. *c.* 76., which enacts: "That no person shall be deemed, adjudged, or taken to retain any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than such person shall inhabit within ten miles thereof." The last word, "thereof," must refer to parish, not estate. That opinion is expressed in note (*a*) of p. 855., vol. iv., of the last (29th) edition of *Burn's Justice*. Here the residence is within ten miles of the parish, if the distance be measured in a straight line. That measurement agrees with the interpretation which, in sect. 76 of stat. 6 & 7 *Vict. c.* 18., the legislature has put upon the provision as to residence "within seven statute miles" in the Parliamentary Reform Act, 2 & 3 *W.* 4. *c.* 45. *s.* 27. It was also the construction which *Parke* J., in opposition to the rest of the Court, put upon a covenant not to keep a public house within half a mile of a certain other public house; *Leigh* v. *Hind* (*a*). The other Judges

(*a*) 9 *B. & C.* 774.

appear to have considered that, in such a case, the parties looked to the possibility of persons going from one house to the other. No such ground of interpretation is applicable here. And, as, before the statute, there was a settlement in such a case as the present, the Court will hold that unambiguous words are necessary to destroy such settlement. The settlement is acquired by residing in the parish, though not on the estate; *Rex* v. *Sowton* (*a*). Any other mode of estimating the distance than by the direct line will be fluctuating, according to the direction and state of present or future roads.

Marsh, contrà. The meaning of the word "thereof" is doubtful: but, for the purpose of the present case, it may be assumed to refer to "parish." But that affects only the terminus a quo: the terminus ad quem is the new residence: and, if the line be measured according to the nearest mode of access, that is distant more than ten miles from the parish of *Furneux Pelham*. If the straight line be adopted, a party, though living twenty miles practically from the parish, might literally be said to live within ten miles. The legislature had in view the degree of controul which the owner of an estate would, by means of proximity, retain over the estate. *Leigh* v. *Hind* (*b*) is in favour of the respondents: and so is *Woods* v. *Dennett* (*c*), there cited. The enactment in sect. 76 of stat. 6 & 7 *Vict. c.* 18. was probably founded on political considerations: the object was to designate a constant area. The intention of the legislature here must have been more analogous

(*a*) *Bur. S. C.* 125.
(*b*) 9 *B. & C.* 774.
(*c*) 2 *Stark. N. P. C.* 89.

to that of stat. 1 & 2 *Vict. c.* 106. *s.* 3., which prohibits (with certain exceptions) the holding of two benefices not within ten statute miles from each other, and, by sect. 129, directs the distance to be computed from church to church "by the nearest road or footpath, or by an accustomed ferry." A direct line could often not be measured without committing a trespass.

Lord DENMAN C. J. Some statutes furnish one mode of measurement, some another. In *Leigh* v. *Hind* (*a*) one learned Judge, my brother *Parke*, thought that the natural mode of estimating the distance was as the crow flies; but there, with reference probably to the object of the contract, the measurement by the nearest accessible route was adopted. Here we are left very much at large, and without materials for judgment: we find no words referring to any particular object. We have therefore to lay down a fixed and absolute rule. Now, abstractedly, the most reasonable rule appears to be that approved of by my brother *Parke*, namely, a measurement by a direct line. By this we shall avoid the practical difficulty of a settlement being good one day and bad the next.

PATTESON J. We have nothing to guide us except the words "ten miles." We must therefore lay down an arbitrary rule: and I think the best rule will be to take the distance as the crow flies.

WILLIAMS J. I think we ought to apply the geometrical sense of the words: "ten miles" can mean

(*a*) 9 *B. & C.* 774.

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only the distance from one point to the other. We are in no danger here of suggesting an act of trespass; for we have the distance actually found.

Order of Sessions confirmed.

Monday, June 1st.

In the Matter of Seth Turner and Others.

A return to a habeas corpus ad subjiciendum set forth a document, being a conviction and committal under stat. 4 *G.* 4. *c.* 34. *s.* 3., which recited an information and complaint, by the agent of *D.*, that the prisoner had contracted to serve *D.* for a term, and did, before the contract was completed, "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute" &c.: and the document added: therefore, "it manifestly appearing to me" (the justice) that the prisoner "is guilty of the said offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid: and I do hereby order and adjudge that" the prisoner, "for the offence aforesaid, be imprisoned" &c.

Held, that the information shewed no offence, as there might be some lawful excuse for the absence, though the statute simply makes the party's absenting himself from service the ground of complaint; and that the conviction was therefore bad. Prisoner discharged.

Seth Turner, with three other persons (*a*), was brought, by habeas corpus ad subjiciendum, before a Judge at chambers, who, on reading the return, referred the case to the full Court, admitting the prisoners to bail in the mean time.

The writ was directed to the keeper of the house of correction at *Kirkdale*. He returned that *Seth Turner*, and two other of the prisoners, were delivered into his custody, on &c., "under warrants under the hand and seal" of a justice of *Lancashire*; "which warrants were and are as follows." The return then set out the following document in *Turner*'s case.

"*Lancashire*, to wit. To *Philip Markey*, one of the constables" &c., "and to all other constables" &c.,

(*a*) No distinction having been suggested in the argument or judgment between the cases of the four prisoners, the report is confined to one case.

"and also to the governor and keeper of the house of correction" &c. "Be it remembered that, on the 21st day of *January* A. D. 1846, at the parish of *Leigh*, in the said county of *Lancaster*, *Richard Thompson*, of" &c., "underlooker, then and there being the agent for *John Darlington*, of" &c., "coal proprietor, personally came before me, *Thomas Bromiley William Sanderson*, Esq., then and there and still being one of her Majesty's justices" &c., "and, upon the oath of him," &c., "informs me, the said justice," &c., "that *Seth Turner*, the younger, of" &c., "miner, on the 11th day of *November* then last, to wit A. D. 1845, to wit at" &c., "did contract with the said *John Darlington* to serve him, the said *J. D.*, as a miner, for the term of eleven calendar months from the said 11th day of *November* A. D. 1845; and that the said *Seth Turner* the younger did afterwards, to wit on" &c., "in" &c., "enter into the said service of the said *J. D.*, and did afterwards, and before the term of his said contract was completed, to wit on" &c., "at" &c., "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute in that case made and provided. And I, the said *T. B. W. Sanderson*," &c.; stating that the justice issued his warrant; in pursuance of which "the said *Seth Turner* hath this day, to wit" &c., "appeared before me, the said *T. B. W. Sanderson*, so being such justice as aforesaid, and, having heard the charge contained in the said information, declared that he was not guilty of the said offence. Whereupon I, the said *T. B. W. Sanderson*, so being such justice as aforesaid, did proceed to examine into the proof of the charge contained in the said information: and, on this the said 12th day of *February*, A. D. 1846, at" &c., "a

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certain document in writing was, in the presence of the said *Seth Turner* the younger, produced and shewn before me the said *T. B. W. Sanderson* so being such justice as aforesaid; which said document is as follows. 'Agreement made between the undersigned *John Darlington*, of'" &c., "'coalmaster, and the undersigned *Seth Turner*, junior, of," &c., "'collier, this 11th day of *November*, 1845. The said *Seth Turner* junior hereby agrees to serve, and hires himself to, the said *John Darlington* exclusively as his hired servant, in the capacity of a miner, for the term of eleven calendar months from this date: and he agrees, during such service, to work, as a miner, in all or any of the mines or pits of the said *John Darlington*, in *Astley*'" &c., "or elsewhere in *Lancashire*, and to get the coal mixture and slack in a workmanlike and saleable manner, and in such places, and in such method and manner, as he shall from time to time be directed by the said *J. D.*, or any of his underlookers or agents; and, at his, the said *Seth Turner* junior's, own expense, to provide himself at all times with a good and sufficient drawer, and also, on every working day, to do a fair and reasonable day's work. And the said *Seth Turner* junior hereby hires himself to, and agrees to work for, the said *J. D.*, as such servant in mining as aforesaid, at the following wages.'" The contract then set out the wages, being at different rates per basket of 4 cwt. for different produce respectively. "'And also, for the purposes and in the course of such workings, to cut and drive the necessary ends, drifts, &c., at such fair and reasonable prices and wages as shall from time to time (as the nature of such work shall vary, and before entering on the same), be fixed by the said *J. D.* or his underlookers or agents. And,

further, that the said service of the said *Seth Turner* junior shall not be determined at the end of the said eleven months, unless the said *Seth Turner* shall, on the fortnightly pay day next but one preceding, give the said *J. D.*, or his pay-clerk or underlooker, four weeks' notice, in writing under his hand, of his intention to quit his service at the end of such eleven months: and, in default of such notice, the said *Seth Turner* junior shall continue in the said service of the said *John Darlington*, on the terms herein agreed to, for the further space of four weeks, and so on, from month to month, till the expiration of one month after such notice in writing as aforesaid shall have been given. And also that, if the said *J. D.* should at any time or times alter his present or any future method of working his mines, the said *Seth Turner* junior shall work according to the method used for the time being, at such wages as shall be a fair field price for such work. And further that, if, at any time or times during his said service, the said *Seth Turner* junior shall, within the fortnight between pay-day and pay-day, wilfully neglect to work for so much time as shall amount altogether to eleven full fair 'days' work, computing a day's work at eight hours, then and in such case he shall, immediately from and after his said term of service shall be determined, serve and work for the said *J. D.*, as such miner as aforesaid, for such further time as shall be wanting to complete the said period of eleven days' work in each and every fortnight of the said term. And the said *J. D.* hereby agrees to accept and employ the said *Seth Turner* junior, as his servant in mining, at the wages and on the terms above mentioned, except when and so far as he may be prevented by any unavoidable or accidental damage or

obstruction to any engine, gearing, or machinery, or to the said mines or any of them, or to the workings thereof. Provided always, that nothing herein contained shall extend, or be construed to extend, to alter, prejudice, lessen, or otherwise affect the legal remedies or powers which belong to masters and servants in their respective relations to each other, or to coal masters and persons employed by them in collieries with relation to their contracts with each other respecting the same or in relation to the working or management thereof.'" (Signed by *Darlington* and *Turner*.) "And, on this day, to wit" &c., "before me the said justice, one credible witness," to wit &c.: the document then set out evidence on both sides. "Therefore, it manifestly appearing to me, the said *T. B. W. Sanderson*, so being such justice as aforesaid, that the said *Seth Turner* the younger is guilty of the offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid: and I do hereby order and adjudge that the said *Seth Turner* the younger, for the offence aforesaid, be imprisoned in the House of Correction at *Kirkdale* aforesaid, there to remain and be held to hard labour for the term of three months from this the said 12th day of *February*, in the year 1846 aforesaid. And I do hereby command you, the said *Philip Markey*, to take and convey the said *Seth Turner* the younger to the said House of Correction, and to deliver him to the keeper thereof, together with this my warrant: and I do hereby command you, the said keeper of the said House of Correction, to receive the said *Seth Turner* the younger into your custody in the said House of Correction, and him there safely to keep and to hold to hard labour for

the term of three months" &c. "And for your so doing this shall be your sufficient warrant. And it further appears," &c.: the document then stated that the justice made no order touching *Turner*'s wages. "Given" &c., "the 12th day of *February*, A. D. 1846."

(Signed and sealed by the justice.)

"And these are the causes of detaining" &c.

Bodkin now moved that the prisoner should be discharged. First, the conviction discloses no offence within the meaning of stat. 4 *G.* 4. *c.* 34. *s.* 3. It finds the prisoner "guilty of the offence charged upon him in the said information and complaint." Now the information and complaint charge that he did, "before the term of his said contract was completed," "absent himself from his said service, and did thereby then and there neglect to fulfil the same" (that must be the service), "contrary to the form of the statute in that case made and provided." No offence can be committed if the absence has been by permission of the employer, or has been caused by unavoidable accident, or illness. No inference, as to want of permission, can here be drawn from the fact of the complaint: for the informer is not the employer. The words of the statute are indeed followed: but that is not sufficient where the statute is so worded as to include acts manifestly not within its intent. Cases on this point are cited in *Paley on Convictions*, pp. 108—113, 3d ed. In *Rex* v. *Corden* (*a*) a conviction, upon stat. 5 *G.* 3. *c.* 14. *s.* 3., for fishing in a water in inclosed ground being private property, was quashed for not negativing the permission of the owner,

(*a*) 4 *Burr.* 2279.

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though the statute does not make any exception in case of such permission. The statement here, that the absence was "contrary to the form of the statute," will not aid; nor would the word "unlawfully," which, however, is not used; *Rex* v. *Corden* (*a*), *Colborne* v. *Stockdale* (*b*), *Fletcher* v. *Calthrop* (*c*), *Newman* v. *The Earl of Hardwicke* (*d*).

Secondly, the information does not shew the nature of the contract with sufficient particularity: and the importance of this appears from the contract, as set out in the evidence, which contains an exception in cases of damage to the machinery or mines, which the information ought to negative (*e*).

Thirdly, the terms of the contract are unreasonable, the servant being bound for eleven months, at wages in proportion to the coal got, yet the master not being bound to provide work (*g*).

Cowling, *Edward James* and *Fry*, contrà. First: the general rule is, that it is sufficient if a conviction follow the language of the statute on which it is framed. That

(*a*) 4 *Burr.* 2279.
(*b*) 1 *Str.* 493. 496.
(*c*) 6 *Q. B.* 880. 889.
(*d*) 8 *A. & E.* 124.

(*e*) The argument on this and the remaining objections is not reported, the Court not having decided upon them. On the second objection the following authorities were referred to: *Hardy* v. *Ryle* (9 *B. & C.* 603.); *Rex* v. *Neville* (1 *B. & Ad.* 489.); *Lancaster* v. *Greaves* (9 *B. & C.* 628.); *Kitchen* v. *Shaw* (6 *A. & E.* 729.).

(*g*) On this point, the following authorities were referred to: Note, in 1 *Smith's Lead. Ca.* 181., to *Mitchel* v. *Reynolds* (1 *P. Wms.* 181.); *Hitchcock* v. *Coker* (6 *A. & E.* 438.); *Horner* v. *Graves* (7 *Bing.* 735.); *Pilkington* v. *Scott* (15 *M. & W.* 657.); *Williamson* v. *Taylor* (5 *Q. B.* 175.); *Young* v. *Timmins* (1 *C. & J.* 331.; *S. C.* 1 *Tyrwh.* 226.); *Mallan* v. *May* (11 *M. & W.* 653.); *Sykes* v. *Dixon* (9 *A. & E.* 693.); *Morris* v. *Smith* (3 *Doug.* 279.); *Aspdin* v. *Austin* (5 *Q. B.* 671.); *Gale* v. *Reed* (8 *East*, 80.).

appears from *Paley*, p. 108., *Rex* v. *Chandler* (*a*), *Rex* v. *Speed* (*b*). Undoubtedly, when the statute itself has an express exception, or is applicable only under special circumstances, the conviction must negative the exception, or shew the special circumstances: thus, in *Rex* v. *Jukes* (*c*), a conviction was quashed for not stating the offence to have been committed knowingly; but there the statute expressly made the knowledge an element of the offence. So in *Rex* v. *Jarvis* (*d*) it was held that a conviction on the game laws must negative the express qualifications given by statute. But this principle can never be applied to cases where the exception is not expressed in the statute, but is merely a supposable fact. To require that such exceptions should be negatived would make a good conviction impossible; for they may be suggested without limit. If there had been an excuse here, the prisoner might have shewn it. [*Patteson* J. On whom would the onus of proof lie?] Apparently on the prisoner; *Rex* v. *Marsh* (*e*), per *Bayley* J.; *Rex* v. *Neville* (*g*); *Mann* v. *Davers* (*h*). So, "where it is enacted, that all persons, having no reasonable excuse, shall go to their parish church," "there is no need to allege in the indictment, that the defendant had no reasonable excuse; for this will more properly come into question from the plea;" 4 *Bac. Abr.* 328. (7th ed.), tit. *Indictment* (H), 3. The informer, in this case the employer's agent, could not know whether the prisoner had any valid answer to the charge.

(*a*) 1 *Ld. Raym.* 581. *S. C. Carth.* 501.
(*b*) 1 *Ld. Raym.* 588. *S. C. Carth.* 502.
(*c*) 8 *T. R.* 536.
(*d*) 1 *Bur.* 148.
(*e*) 2 *B. & C.* 717. 722.
(*g*) 1 *B. & Ad.* 489.
(*h*) 3 *B. & Ald.* 103.

[Lord *Denman* C. J. Why did he inform without ascertaining that?] If the absence of lawful excuse had been alleged, that would have been objected to as a conclusion in law. [Lord *Denman* C. J. It would shew that attention had been turned to the point.] The information gives notice of what is to be proved. The prisoner is charged with neglecting to fulfil the contract, contrary to the statute. If he had an excuse there would be no neglect. The absence is an offence only because it is a neglect. Such an allegation would be a good breach in a civil action: the statute substitutes a penalty for an action. [*Patteson* J. Sect. 3 has the words "or be guilty of any other misconduct or misdemeanour in the execution thereof:" would it be enough to say that the prisoner had otherwise misconducted and misdemeaned himself in the execution of his contract, contrary to the statute?] The nature of the offence must appear: here it does. In *Rex* v. *Corden* (*a*) the Court laid a stress on the circumstance that the penalty was given to the owner, as shewing that his consent must be negatived. But here that is not so. It is there said: "if the owner had been the complainer, that would have shewn his dissent:" the complaint here is by the employer's agent, which has the same legal effect. Sect. 4 recognises the agent as standing in the place of the employer. In *Fletcher* v. *Calthrop* (*b*) the context of the statute shewed the necessity of the allegation in question. The omission of the word "unlawfully" will not aid the objection; *Rex* v. *Chipp* (*c*). In *Newman* v. *The Earl of Hardwicke* (*d*) the conviction was bad, because, by the sta-

(*a*) 4 *Bur.* 2279.
(*b*) 6 *Q. B.* 880.
(*c*) 2 *Str.* 711.
(*d*) 8 *A. & E.* 124.

tute there in question, there could be no offence till the hours were fixed, and it was not shewn that any hours were fixed. (They then argued against the second and third objections.)

Bodkin and *Huddlestone*, in support of the rule. The absenting is the substantive offence charged: the "neglect to fulfil" is a matter inferred from the offence shewn: at any rate the addition of these words cannot make the complaint good, if otherwise insufficient In *Wood* v. *Fenwick* (*a*) the commitment rightly adjudged that the prisoner had absented himself "without leave or any just cause." The warrant in *Johnson* v. *Reid* (*b*) contained a similar averment. In *Regina* v. *Richards* (*c*) the second commitment, which was upheld, stated that the prisoner "did neglect his work and refuse to go to it on being requested" by his employer. [*Patteson* J. To negative licence alone, in this case, would not be enough, according to your argument; because there might be other reasonable cause of absence.]

Lord DENMAN C. J. The question at last comes to this: whether the information states any offence. I think it does not. It is essential that there should be, on the face of the information, something on which the justices may convict. Now to complain merely that the party absented himself from his service is to charge no offence, unless it be added that this was done without leave or lawful excuse. The want of leave is a circumstance that the employer and his agent have the means of knowing

(*a*) 10 *M. & W.* 195.
(*b*) 6 *M. & W.* 124. See *Ex parte Johnson*, 7 *Dowl. P. C.* 702.
(*c*) 5 *Q. B.* 926.

and stating: other lawful excuse there may indeed be, which the complainant may not know of; but he might at least shew that he knew of no such excuse. Then, the conviction is merely of the offence charged in the information: and none is charged. As to the contract not being stated in the information, the argument that has taken place upon its effect is an important illustration of the necessity of stating both the contract and the offence fully. As to the third point, I will only say that I should be sorry that any opinion of mine, respecting the objection to the contract on general grounds, should have the effect of preventing parties from being amenable upon terms of agreement into which they have voluntarily entered.

PATTESON J. The conviction is only of the offence charged in the information. Is any offence charged? The charge is that the prisoner absented himself from service. Must that be laid to be without lawful excuse? If it must, no offence is here charged. The information does add that the prisoner did thereby "neglect to fulfil the same," contrary to the statute: but that is not a direct charge; it is only an inference from what precedes; if the absenting does not constitute an offence as laid, the inference is not warranted. It therefore comes to this; whether it is necessary to negative lawful excuse. I think it is, and that the absence must be shewn to be wilful, or without lawful excuse. As this information is framed, it would have been proved by shewing that the prisoner had stayed away because he had broken his leg. Whether the magistrate might convict simply for neglecting to fulfil the contract, on account of the language of the statute, I do not say.

WILLIAMS J. I always thought that the law was properly laid down by Lord *Mansfield* in *Rex* v. *Corden* (*a*), that, if the fact, as charged, may be consistent with the innocence of the prisoner, no offence is charged. It is argued that the information is merely a notice given to shew what is to be proved: but that is not so; it is the foundation of the conviction, inasmuch as it is what gives the magistrates jurisdiction: and that is the reason why it is examined so strictly. The question then comes to this: on whom is the onus of negativing the excuse? It is said to be sufficient to follow the words of the statute: but many cases may be put in which a party may absent himself from service, within the general terms of the statute, consistently with perfect innocence: the onus therefore is on the complaining party. In *Rex* v. *Corden* (*a*) the complaining party was a third person; and, unless the consent of the owner was expressly negatived, nothing wrongful would appear, although, if the owner himself had complained, there might have been some evidence of want of consent. This last distinction, if tenable, is inapplicable here: the whole question is, whether it be enough to say, nakedly, that the prisoner absented himself from the service. The averment introduced by the words "and did thereby" can add nothing.

Prisoners discharged.

Recognizances discharged.

(*a*) 4 *Bur.* 2279.

Monday,
June 1st.

In the Matter of JOHN HAMMOND.

A return by the keeper of a house of correction to a habeas corpus ad subjiciendum stated that the prisoner was in custody under a commitment, the tenor of which was as follows. A document was then set out, addressed to all constables &c. and to the keeper, reciting that complaint had been made to a justice, on oath, that the prisoner had contracted to serve the complainant, and had absented himself from the service without his master's consent, before the contract was completed, contrary to the form of the statute &c.; that the complainant was "on this said 14th day of *November*" brought before the said justice and another justice to answer the complaint: "whereupon we, the said justices, in pursuance of the statute" &c., "did then and there duly examine the proofs and allegations of both parties, touching the matter of the said complaint, they having come before us for that purpose, and, upon due consideration had thereof, have, on the oath of the said" (complainant), "taken in the presence and hearing of the said" (prisoner), "adjudged and determined, and do hereby adjudge and determine, the said complaint to be true: and we do therefore convict the said" (prisoner) "of the said offence, in pursuance of the statute" &c. The document then commanded the constables to take the prisoner to the house of correction, and deliver him to the keeper, "together with this warrant;" and the keeper was required to receive him, to remain and be held to hard labour for the space &c.: "and for so doing this shall be your sufficient warrant." Given under the hands and seals of the justices, 14th *November*.

Held, no other document being before the Court, that this must be taken to have the double character of a conviction and commitment, under stat. 4 *G.* 4. *c.* 34. *s.* 3.; and that, as it did not set out the evidence (and, per *Patteson* and *Williams* Js., as it did not in form adjudge any imprisonment), it was bad in the character of a conviction. Prisoner discharged.

JOHN HAMMOND was brought, by habeas corpus ad subjiciendum, before a Judge at chambers, who, on reading the return, referred the case to the full Court, admitting *Hammond* to bail in the mean time.

The writ was directed to the Keeper of the House of Correction at *Stafford*. He returned that *Hammond* was taken and detained in his custody, "under and by virtue of the several commitments" under the hands and seals of two justices of *Staffordshire;* "the tenor of which said several warrants of commitment is as follows." The return then set out two documents, both dated 14th *November*, 1845: but, as no distinction was suggested, in the argument or judgment, between the two, only one is here set out. It was as follows.

"County of *Stafford*. To all constables &c., "and

to the Keeper of the House of Correction" &c. "Whereas complaint hath been, this 14th day of *November* A. D. 1845, made unto me, *Henry Hill* Esq., one of Her Majesty's justices" &c., "upon the oath of *Edward Brown*, of" &c., "miner, that *John Hammond*, of" &c., "miner, hath contracted with the said *Edward Brown* and his partner, in the said county, to serve them in the capacity of a miner until he shall have given to, or received from, his said masters one fortnight's notice to quit and leave his said masters' service, and until such notice shall have fully expired, and hath entered into such service, and did, on this 14th day of *November*, in the year aforesaid, in" &c., "absent himself from the same service, in the county aforesaid, without his said masters' consent, before his said contract was completed, and contrary to the form of the statute in such case made and provided: And whereas the said *John Hammond* was, on this said 14th day of *November*, brought before me, the said *Henry Hill* Esq., and *George Briscoe* Esq., one other of Her Majesty's justices" &c., "to answer unto the said complaint: Whereupon we, the said justices, in pursuance of the statute in that case" &c., "did then and there duly examine the proofs and allegations of both parties touching the matter of the said complaint, they having come before us for that purpose; and, upon due consideration had thereof, have, on the oath of the said *Edward Brown*, taken in the presence and hearing of the said *John Hammond*, adjudged and determined, and do hereby adjudge and determine, the said complaint to be true: And we do therefore convict the said *John Hammond* of the said offence, in pursuance of the statute in that case" &c. "These are, therefore, to command you,

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the said constables, forthwith to convey the said *John Hammond* to the said House of Correction, and deliver him to the said Keeper thereof, together with this warrant; and you, the said Keeper, are hereby required to receive the said *John Hammond* into your custody in the said House of Correction, there to remain and be held to hard labour for the space of one month from the date hereof: and for so doing this shall be your sufficient warrant. Given" &c., "the 14th day of *November* 1845." (Signed and sealed by the two justices.)

"And these are the causes" &c.

Bodkin now moved that the prisoner might be discharged. This is a conviction under stat. 4 *G.* 4. *c.* 34. *s.* 3.; and it is bad for not setting out the evidence. That it is a conviction appears from *Regina* v. *Tordoft* (*a*), where the Court clearly held the commitment, under the same section, to operate in itself as a conviction, no other conviction being returned. In *Regina* v. *Richards* (*b*), under the same section, two warrants of commitment were returned: one recited a conviction, which was abandoned as bad for not setting out the evidence, and another and later recited a good conviction; and the Court held that the prisoner could not be discharged: that shews the necessity that a good conviction should appear. So in the case *In re Gray* (*c*), where the warrant, as here, did not recite a conviction, the prisoner was discharged, because the warrant did not itself possess the requisites of a good conviction: and *Patteson* J. said (*d*): "it cannot matter what the instrument is called, whether an order or a conviction. It is a mere dispute about terms." There ought to be

(*a*) 5 *Q. B.* 933.
(*b*) 5 *Q. B.* 926.
(*c*) 2 *Dowl. & L.* 539.
(*d*) P. 544.

some means of reviewing the decision of the magistrate. In *Rex* v. *The Justices of Cheshire* (*a*) the adjudication was held to be an order only, and not a conviction, because the statute on which it was framed, 11 *G.* 2. *c.* 19. *s.* 4., expressly so termed it.

Pashley, contrà. It is true that a conviction, properly so called, must recite the evidence. But this is a warrant of commitment. In the case cited, *In re Gray* (*b*), *Patteson* J. said: "I am not bound to determine on the present occasion, whether it be necessary to set out the evidence in an instrument of this kind? That point will no doubt be raised some day, and it is very fitting that it should be determined; but sitting alone in this Court, I think I ought not to express any opinion upon it, where the case does not require it." *Regina* v. *Richards* (*c*) shews at least that this is not necessarily a conviction. Many anomalies will arise from so treating it. It will possess the attributes of a record. Now a record of conviction may be formally drawn up at any time; *Rex* v. *Barker* (*d*). So that, if a party were discharged on this document, a good one might be returned the next day: and then, there being a warrant founded on a good conviction, the gaoler might be liable for an escape. The return itself calls this a warrant of commitment: probably it has never been on parchment till returned. It sets out the practical effect of the evidence, about to the same extent as would be done on a demurrer to evidence: and this, unless it be a conviction in the strictest sense of the word, must be enough. Supposing a formal conviction to exist, there is nothing besides an incidental expression at the close of

(*a*) 5 *B.* & *Ad.* 439.
(*b*) 2 *Dowl.* & *L.* 539.
(*c*) 5 *Q. B.* 926.
(*d*) 1 *East*, 186.

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the judgment in *Regina* v. *Tordoft* (*a*) to shew that it could be returned with the warrant of commitment: the gaoler has no such document, and could not justify the detention by a document which might be drawn up after the detention had taken place. He has only to look to the warrant, which should shew, first, jurisdiction; secondly, an offence (Dr. *Groenvelt's Case* (*b*), *Daniell* v. *Philipps* (*c*)); thirdly, a punishment warranted by the offence. A conviction is a record: the word "conviction" is not in stat. 4 *G.* 2. *c.* 26., and therefore, unless it be included under the word "record," a conviction ought still to be in Latin. Records must be on parchment; *Co. Litt.* 260 a., *Termes de la Ley*, tit. *Record* (*d*): they must be entered as of record; *Wigley* v. *Jones* (*e*): whereas even a writ of habeas corpus cum causâ, under which a party is committed in execution, is not filed of record; *Cooper* v. *Jones* (*g*). Upon a habeas corpus the record is not returned, as it is on a certiorari; per *Holt* C.J. in *Fazakerly* v. *Baldoe* (*h*). The present document does not state that the parties are *thereby* convicted; the words are only "we do therefore convict," which go no farther than the words "is convicted before us" in the warrant in *Daniell* v. *Philipps* (*c*); and the same words, as here, are to be found in the warrant in *Wood* v. *Fenwick* (*i*). [*Patteson* J. In those cases there were convictions besides the warrants.] They shew that this is a warrant. [*Patteson* J. It is so: but may it not be a conviction also? I find it difficult to assume that a conviction must be a record.]

(*a*) 5 *Q. B.* 940.
(*b*) 1 *Ld. Raym.* 213.
(*c*) 1 *C. M. & R.* 662. 673. *S. C.* 5 *Tyrwh.* 293. 305.
(*d*) Ed. 1685, p. 577. (In some earlier editions this title does not appear.)
(*e*) 5 *East*, 440.
(*g*) 2 *M. & S.* 202.
(*h*) 6 *Mod.* 177.
(*i*) 10 *M. & W.* 195.

It may as well be so in this case as in the case of a conviction for forcible entry, where the statute, 15 *R.* 2. *c.* 2., speaks of the conviction as a record of the justices. Unless the custody is clearly illegal, the prisoner will not be discharged on habeas corpus; it is enough if the statement in the return be substantially accurate: that principle was acted on in *Leonard Watson's Case* (*a*); and *Bethell's Case* (*b*), *In the Matter of Clarke* (*c*), and *City of London's Case* (*d*), are to the same effect. [*Patteson* J. Suppose there had been a certiorari to the justices.] They would have had time to draw up a formal conviction, and would have sent it. [*Patteson* J. Suppose they had none to send.] Such a return would have been contemptuous: they would have been bound to draw up a conviction. [*Patteson* J. That depends upon the statute. Was it intended that there should be two acts?] *Regina* v. *Richards* (*e*) shews that that is a proper course. [*Patteson* J. But not that such a course is obligatory. Suppose the justices meant, as I have no doubt they did, that this should be the only conviction. The certiorari would call on them, not to make a conviction, but to return what they had made. A certiorari, in form, assumes the fact of a conviction.] But, in point of fact, the conviction is, in most cases, drawn up afterwards; and that, although "manifest error" be alleged before the conviction exists. Here the attempt is to make a correction as to form impossible, by raising the point on habeas corpus. [*Patteson* J. But suppose the justices returned this docu-

(*a*) 9 *A. & E.* 731. 787.
(*b*) 1 *Salk.* 348. *S. C.* 5 *Mod.* 19. 23.
(*c*) 2 *Q. B.* 619.
(*d*) 8 *Rep.* 121 *b.* 127 *b.*, 128 *a.*
(*e*) 5 *Q. B.* 926.

ment, to a certiorari, as a record of conviction.] That would be a false return. [*Patteson* J. You assume that the document cannot be both a conviction and a warrant.] That assumption is justifiable: a warrant addressed to a constable or a gaoler cannot be a conviction; whereas, on the other side, it is assumed that this is a conviction; for the objections apply only on that assumption; and, at the same time, it is attempted to prevent the Court from seeing whether there be any, and what, conviction. When a return recites a conviction, the Court gives judgment, if necessary, on that conviction as recited; as in *Regina* v. *King* (*a*), *In re Henry Reynolds* (*b*). In *Rex* v. *The Justices of Cheshire* (*c*) the Court refused to treat the order as a conviction: yet the statute there, 11 *G.* 2. *c.* 19. *s.* 4., required the justices to examine the fact, and witnesses, upon oath, and to determine whether the party charged "be guilty of the offence:" and these are as decided characteristics of a conviction as any thing in the document now before the Court. If, therefore, it was intended, as was said in *Johnson* v. *Reid* (*d*), that a single instrument should have the effect of adjudicating and committing, the case of *Rex* v. *The Justices of Cheshire* (*c*) shews that the validity of it must not be tried by the rules applicable to a conviction.

Bodkin and *Huddlestone*, in support of the rule, were stopped by the Court.

Lord DENMAN C. J. We must deal with this document as we find it. By its very terms it is a convic-

(*a*) 1 *Dowl. & L.* 721.
(*b*) 1 *Dowl. & L.* 846.
(*c*) 5 *B. & Ad.* 439.
(*d*) 6 *M. & W.* 124.

tion: we do not even know that the original is not on parchment; if that be necessary, I should presume that it was so; for the document purports to convict. There may possibly be means of making out and shewing a good conviction hereafter; but, in the mean time, we have nothing before us warranting the detention (*a*). In *Bethell's Case* (*b*) the defendant was convicted by a Court of oyer and terminer, as appeared by the return; and this Court said that the commitment was not causeless, and that they would not discharge for a defect only in the form of the commitment. Here we have no cause shewn except a sort of conviction which is bad in law.

PATTESON J. A difficulty arises here, partly from the statute and partly from the form of the document. The statute does not use the word "convict," but merely enacts that, if it shall appear to the justice that the defendant is guilty, it shall be lawful to commit, and abate the wages, or discharge from the service. Now this document, in form, is a conviction; though, no doubt, it is also, in form, a warrant of commitment, inasmuch as it directs the constable to convey and the gaoler to receive. But it states that a complaint was made, that proofs were examined, and a witness

(*a*) The reporters are informed by Mr. *Robinson*, the Master of the Crown Office, that the understood practice is, that, if the warrant of commitment be bad, and the justices or informer prefer to rely on a good conviction, it is for them to bring up such conviction by certiorari, and that it is not the duty of the defendant to remove a conviction of which he is not supposed to know any thing, and which may not exist. If the conviction be not brought before the Court, the Court will not presume that there is a good one, or any, but will decide on the document actually before them.

(*b*) 1 *Salk.* 348. *S.C.* 5 *Mod.* 19. 23.

heard on oath, and that the justices "do hereby adjudge and determine," and "do therefore convict." What can these terms mean, if the instrument be not intended for a conviction? We do not know whether or not it was on parchment, because the return gives the tenor only, and the original document is not sent up. This document is, at once, a conviction, and a commitment in respect of such conviction. I admit that, even so, it is not a formal conviction; for, after stating that the justices convict of the offence, it only orders the constable to convey and the gaoler to receive, without adjudging any imprisonment. It is clear, however, that the document has a double character; and, as a conviction, it is undoubtedly bad.

WILLIAMS J. Mr. *Pashley* was right in contending that this is a warrant of commitment. But what is there before us to shew that there has ever been any other document containing a conviction? We can take notice of nothing else: if there be any thing more, we are left in the dark. Then, assuming the double character of this document, it purports to be a conviction, and is bad for the reason urged on behalf of the prisoner: besides which, the defect pointed out by my brother *Patteson* is fatal to it in its character of a conviction, inasmuch as the justices, after convicting, do not adjudge any imprisonment, but only direct the constables to convey and the gaoler to keep. The prisoner must therefore be discharged.

Prisoner discharged.

Recognizances discharged.

STEPHEN MAY, and SOPHIA, his Wife, *against* BURDETT.

Tuesday, June 2d.

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said *Sophia* the wife of the said *Stephen May*, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit on the 2nd of *September* 1844, did attack, bite, wound, lacerate and injure the said *Sophia*, then and still being the wife of said *Stephen May*, whereby the said *Sophia* became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating and injuring her as aforesaid, the said *Sophia* has been greatly injured in her health," &c.

Plea, Not guilty. Issue thereon.

A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is primâ facie liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities.

Quære, whether, to an action on the case for injury caused as above stated, it would be a defence that the injury was occasioned solely by the wilfulness of the plaintiff, after warning.

On the trial, before *Wightman* J., at the sittings in *Middlesex* after *Hilary* term, 1845, a verdict was found for the plaintiff with 50*l.* damages. *Cockburn*, in the ensuing term, obtained a rule to shew cause why judgment should not be arrested.

In last *Hilary* term (*a*),

Watson and *Couch* shewed cause. The only question is, whether the declaration is bad because it does not state that the defendant kept the animal negligently. The present form is consistent with the law and the precedents. The wrong on which an action of this kind proceeds is the knowingly keeping an animal accustomed to do mischief. "In evidence to an inquest it was agreed by *Fitzherbert* and *Shelley*, that if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing; otherwise is it, if he have notice of the quality of the dog:" *Anonymous* (*b*) placitum in *Dyer*. "An action upon the case will lie for keeping a dog used to bite sheep, and which has killed sheep belonging to the plaintiff; but in such case it must be proved that the defendant knew that he would bite sheep:" *Bull. N. P.* 77. The author cites *Smith* v. *Pelah* (*c*) and *Jenkins* v. *Turner* (*d*), where the gist of the action is stated in the same manner. And he adds (citing *Rex* v. *Huggins* (*e*)): "There is a difference between things feræ naturæ, as lions, bears, &c. which a man must keep up at his peril, and beasts

(*a*) *January* 13th, 15th and 26th, 1846. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

(*b*) 1 *Dyer*, 25 *b.* pl. 162.

(*c*) 2 *Stra.* 1264.

(*d*) 1 *Ld. Ray.* 109.

(*e*) 2 *Ld. Ray.* 1574. 1583.

that are mansuetæ naturæ, and break through the tameness of their nature; in the latter case the owner must have notice; in the former an action lies without notice." The Mosaic Law (*a*), referred to in the margin of the placitum in *Dyer*, agrees with ours. The wrong consists in keeping the animal, even though it be mansuetæ naturæ, if the owner knows that it has been used to do mischief, and if injury results from the keeping. The scienter, not negligence in keeping, constitutes the tort. The doctrine stated in *Dyer* is adopted in *Com. Dig. Action upon the case for negligence* (A 5.); and *Comyns* observes: "It is sufficient to say, canem ad mordendum consuetum scienter retinuit." [*Coleridge* J. You cannot suppose that that is meant as giving the complete form of a declaration.] In 1 *Vin. Abr.* 234. tit. *Actions* [Mischief by dogs, &c.] (H), pl. 3., it is said: "If a man has a dog that kills sheep, the master of the dog being ignorant of such quality, the master shall not be punished for this killing; but if he has notice of such quality, it is otherwise." Declarations averring misconduct in the keeping of a horse, a dog, or a bull, but omitting the scienter, have been held insufficient; *Scetchet* v. *Eltham* (*b*), *Mason* v. *Keeling* (*c*), *Bayntine* v. *Sharp* (*d*). The case of *Michael* v. *Alestree* (*e*), cited in moving for the present rule, is no authority to the contrary. There a scienter was held unnecessary; but the complaint was not of a mere improper keeping, but that the defendant, by his servant, carelessly drove ungovernable horses for the purpose of

(*a*) *Exodus*, c. xxi. 28, 29. 36. (*b*) *Freem. C. B.* 534.
(*c*) 12 *Mod.* 332.; *S. C.* 1 *Ld. Ray.* 606.
(*d*) 1 *Lutw.* 90. See *Buxendin* v. *Sharp*, 2 *Salk.* 662.
(*e*) 2 *Lev.* 172.

breaking them, in a public place. [Lord *Denman* C. J. He brought the horses to a place where people were.] The case of keeping a vicious animal is analogous to those in which persons merely keeping dangerous weapons or instruments have been held liable if mischief resulted from their being kept: *Dixon* v. *Bell* (*a*), *Townsend* v. *Wathen* (*b*). In *Blackman* v. *Simmons* (*c*) the mere keeping a dangerous bull, with knowledge, appears to have been considered a ground of action, mischief having ensued. The same conclusion may be drawn from *Curtis* v. *Mills* (*d*). [*Patteson* J. It does not appear, in the present case, that the monkey may not have been chained up, and have unexpectedly escaped. But you say that, if a party keeps such an animal, chained, he runs the risk of its breaking loose.] That is the law. [*Patteson* J. Suppose it had been confined in a cage, and the plaintiff's wife had put her hand in.] Actual misconduct in the plaintiff might be a defence, under the general issue or a special plea (*e*). The present form of declaration agrees with the precedent in 2 *Chitty on Pleading*, 430 (*g*). [*Patteson* J. Mr. *Chitty* observes that, before the New Rules prohibiting more than one count on the same transaction, it was usual to add other counts, one of which was for not keeping the dog properly secured.] A form like the present was used in *Thomas* v. *Morgan* (*h*). The older precedents are similar: *Regist. Brev.* 110 *b.*, cited, and relied upon

(*a*) 5 *M. & S.* 198.,

(*b*) 9 *East*, 277.

(*c*) 3 *Car. & P.* 138.

(*d*) 5 *Car. & P.* 489.

(*e*) *Patteson* J. alluded here to the case of a person going into a place where he had no business to be at the time, and being there bitten by a dog: probably *Brock* v. *Copeland*, 1 *Esp. N. P. C.* 203.

(*g*) 7th ed.

(*h*) 2 *Cro. M. & R.* 496; *S. C.* 5 *Tyr.* 1085.

by the Court, in *Cropper* v. *Matthews* (*a*), *Rast. Ent.* 616 *b.*, *Plead. Assist.* 105, 117., *King* v. *Peach* (*b*), *Lib. Plac.* 40, pl. 56., *Morg. Prec.* (*c*), 443, 8 *Wentw. Pl.* 437. (*Watson* also stated that the present form accorded with manuscript precedents of the late Mr. Serjt. *Williams* and Mr. Justice *Richardson*, and with precedents extracted by himself from the books of Mr. Justice *Bayley*). The averment here that the defendant knew it to be dangerous "to allow the said monkey to be at large" is not material, and does not render it necessary to shew that the monkey was in fact allowed to be at large.

Cockburn and *Pickering*, contrà. The question in this case is important, inasmuch as the plaintiff assumes that it is illegal even to keep a destructive animal, as is done at the gardens of the *Zoological* Society and other menageries, and that, however carefully such animal may be kept, yet, if it escapes, without any fault on the owner's part and does damage, or even if an incautious person be hurt, or an excessively timid person terrified, by the animal while under proper restraint, the owner is answerable. No decision has gone that length; and, in the present case, the declaration alleges nothing inconsistent with a strictly proper keeping. In *Com. Dig. Action upon the Case for Negligence*, the division (A 5.) referred to on the other side is headed "For a neglect in taking care of his dog, horse, cattle," &c., and the first instance given is "if a man ride an unruly horse in *Lincoln's Inn Fields*, (or other public place of resort,) to tame him, and he break

(*a*) 2 *Sid.* 127, where *Reg. Brev.* 108 is also cited, but this seems a mistake. See *Reg. Brev.* 111 *a.*

(*b*) 1 *Lil. Ent.* 29.

(*c*) *Morgan's Precedents* form vol. iii. of *The Attorney's Vade Mecum.*

loose, and strike the plaintiff;" on which point *Michael* v. *Alestree* (*a*) is cited. In *Ventris*'s report of that case, the Court is stated to have said: "Lately, in this Court an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning of him." And in *Keble*'s report of *Michael* v. *Alestree* (*a*) reference is made to a case "where a monkey escaped and did hurt, by default of the owner." Neglect, and not merely the having such animals, was essential to the action in each of the cases. This remark applies also to the placita in the division of *Com. Dig.* before cited, as to a mad bull, and the case in which, if a dog has once bit a man, and the owner, having notice, keeps him "and lets him go about or lie at his door," a person bitten by the dog may bring an action; *Smith* v. *Pelah* (*b*). It is true that the scienter is also a necessary averment; but that is because knowledge is an ingredient of negligence: and for that reason it is laid down in *Com. Dig. Pleader* (2 P 2.) that "a declaration for a neglect in keeping his dog," &c. "must say that the defendant was sciens of the mischievous quality." In *Brock* v. *Copeland* (*c*), where the declaration stated "that the defendant knowingly kept a dog used to bite," and by which the plaintiff was bitten, Lord *Kenyon* ruled, that the action would not lie. He said "that every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go

(*a*) 2 *Lev.* 172.; *S. C.* 1 *Ventr.* 295., 3 *Keb.* 650.
(*b*) 2 *Stra.* 1264.
(*c*) 1 *Esp. N. P. C.* 203.

at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." The only plea there was Not Guilty. [*Coleridge* J. "Not Guilty," then, had not the same effect as the plea of Not Guilty in modern times.] There is no instance of a special plea that the injury done by the animal resulted from the plaintiff's own negligence. In the passage, cited on the other side, from the judgment in *Rex* v. *Huggins*(*a*) the question discussed is, in what cases notice of the mischievous quality of the animal is essential to the owner's liability; and the difference stated, on that point, is, whether the animal be originally mansuetæ or feræ naturæ. But in neither case does it appear that liability attaches without any negligence in the owner. Even where death has ensued, the Court says: "If the owner have notice of the mischievous quality of the ox, &c. and he uses all proper diligence to keep him up, and he happens to break loose, and kills a man; it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad, after warning or notice of his condition, it is the opinion of *Hale*, that it is manslaughter in the owner. And if he did purposely let him loose, and wander abroad, with a design to do mischief; nay, though it were but with a design to fright people and make sport, and he kills a man; it is murder in the owner." In *Justinian's Institutes*, B. 4. tit. IX., it is said (after distinguishing between damage done by animals which are naturally

(*a*) 2 *Ld. Ray.* 1583.

ferocious, and by those which act against their nature in doing damage), "si ursus fugerit a domino, et sic nocuerit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit." In that case there is no longer a power of controul, and therefore no room for negligence nor any ground for liability. A monkey is naturally a wild animal: and there is no averment in this case that it was tame when the mischief happened. If, therefore, it escaped without the owner's fault, and did damage, he would not be liable. Thus it is said, in *Com. Dig. Action upon the case for Negligence* (A 5.), that, "if a man has a tame fox, which escapes and becomes wild, and does mischief, the owner shall not answer for the damage done afterwards "(*a*). If, indeed, he wilfully or carelessly set the animal at liberty, he would be liable, according to the dictum of Lord *Ellenborough* in *Leame* v. *Bray* (*b*): "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." The principle by which cases like this must be governed is, that a man may do, on his own land, what he thinks proper, so that he does not thereby interfere with the rights of others. A man may set dog-spears in his own ground, even without giving notice to others; *Jordin* v. *Crump* (*c*): so, he may keep a dangerous animal there: and, the act being legal, he is not answerable for a misfortune which results from it, unless caused by misconduct of his own. Here it is consistent with all the averments that the plaintiff and not the defendant may have been in fault.

(*a*) See 1 *Ld. Ray.* 606. (in *Mason* v. *Keeling*).
(*b*) 3 *East*, 593, 595.
(*c*) 8 *M. & W.* 782.

The course of precedents, at least since the date of the older entries cited on the other side, has not been uniform: and (as is stated in 2 *Chitt. Pl.* 430 (*a*)) before the New Rules it was usual to draw a separate count averring negligence in not keeping the animal secured: *Jones* v. *Perry* (*b*) and *Hartley* v. *Harriman* (*c*) afford instances. In the case of the butcher, cited in *Ventris's* report of *Michael* v. *Alestree* (*d*), negligence was charged; and the same averment appears to have been made in the action for mischief done by a monkey, referred to in *Keble's* report of the same case (*e*). In *Mason* v. *Keeling* (*g*), where the validity of the declaration was discussed on demurrer, the count alleged that the dog attacked the plaintiff "pro defectu debitæ curæ et custodiæ" by the defendant, who permitted the dog "liberè et ad largum ire." In *Blackman* v. *Simmons* (*h*) negligence was expressly averred. And, in *Curtis* v. *Mills* (*i*), the materiality of such an allegation appears from the stress laid by *Tindal* C. J. on the question whether or not the dog was placed in such a situation that by common care the plaintiff might have avoided him. A precedent, in 8 *Went. Pl.* 581, of a declaration for mischief done by unruly rams belonging to the defendant, alleges, not only a scienter, but negligence in permitting them to go at large. Even in the present case, the framer of the declaration seems to admit that the owner, to be liable, must have contributed, by some neglect or permission, to the animal's escape, since the count avers knowledge

(*a*) 7th ed.
(*b*) 2 *Esp. N. P. C.* 482.
(*c*) 1 *B. & Ald.* 620.
(*d*) 1 *Vent.* 295.
(*e*) 3 *Keb.* 650.
(*g*) 1 *Ld. Ray.* 606.; *S. C.* 12 *Mod.* 332.
(*h*) 3 *Car. & P.* 138.
(*i*) 5 *Car. & P.* 489.

by him "that it was dangerous and improper to allow the said monkey to be at large and unconfined"; in which respect it unquestionably departs from the precedents cited on the other side.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument: and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is primâ facie liable in an action on the case at the suit of any person attacked and injured

by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the *Register* and ending with *Thomas* v. *Morgan* (*a*), and all in the same form, or nearly so. In the *Register*, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason* v. *Keeling* (*b*), reported in 1 *Ld. Ray.* and 12 *Mod.*, and much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also: but various dicta in the books were cited to shew that this is an action founded on *negligence*, and therefore not main-

(*a*) 2 *C. M. & R.* 496; *S. C.* 5 *Tyr.* 1085.
(*b*) 12 *Mod.* 332; *S. C.* 1 *Ld. Ray.* 606.

tainable unless some negligence or want of care is alleged.

In *Comyns's Digest*, tit. *Action upon the case for Negligence* (A 5.), it is said that "an action upon the case lies for a *neglect* in taking care of his cattle, dog, &c.;" and passages were cited from the older authorities, and also from some cases at nisi prius, in which expressions were used shewing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure *at his peril*, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith* v. *Pelah* (*a*), and a passage in 1 *Hale's Pleas of the Crown*, 430 (*b*), put the liability on the true ground. It may

(*a*) 2 *Stra.* 1264.

(*b*) After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable," &c., *Hale* adds (citing authorities) that "these things seem to be agreeable to law.

1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

2. Though he have no particular notice, that he did any such thing before, yet if it be a beast, that is feræ naturæ, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey, that broke his chain and got loose.

3. And therefore in case of such a wild beast, or in case of a bull or

be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance: but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shews a primâ facie liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal feræ naturæ, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his controul: but we cannot allow any weight to this objection: for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it: we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

Rule discharged (*a*).

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cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." 1 *Hale's P. C.* 430. Part I. c. 33.

(*a*) See *Jackson* v. *Smithson*, 15 *M. & W.* 563. Also, *Card* v. *Case*, in *C. B.*, *Feb.* 9. 1848.

Tuesday, June 2d.

Pennell and Others, Assignees of Bradshaw, a Bankrupt, *against* Rhodes and Crucknell.

Under stat. 5 & 6 *Vict. c.* 122., if a trader, summoned by his creditor under sect. 11, and being indebted to him in 149*l.* 4*s.*, signs an admission that he is indebted to such creditor in 149*l.*, and there is nothing to shew that the 4*s.* was intentionally omitted, such trader does not commit an act of bankruptcy if he omits to perform any thing required by sect. 13 or sect. 15 from parties refusing to admit debts on summons, or admitting them in part.

If the trader, having, on summons, given an admission according to stat. 5 & 6 *Vict. c.* 122., agrees with the creditor to deposit bills with him as a security, and submit to a Judge's order for payment of the debt by instalments, with which terms the creditor is satisfied, no act of bankruptcy is committed though more than fourteen days elapse between the filing of the admission and the day appointed for fulfilling the stipulated terms, provided the agreement itself be made within the fourteen days; for in such case the trader has compounded for the demand in due time, to the satisfaction of the creditor, within the meaning of sect. 14.

THIS was a feigned issue to try the right of the plaintiffs, as assignees of *Bradshaw*, to certain goods seized in execution by the defendants. A verdict was found for the plaintiffs by consent, subject to the opinion of this Court upon a special case, the material parts of which are as follows.

The plaintiffs are the official and trade assignees of the bankrupt. The fiat issued, *March* 27th, 1844, on a debt due to one *Cyrus Jay* from the bankrupt, who was a trader within the statutes concerning bankrupts. On 5th *February* 1844, and from thence up to and upon 3d *March* 1844, and thence hitherto, save as after mentioned, the bankrupt was indebted to the defendants as copartners in trade, in the way of their business as woollen warehousemen, in the sum of 149*l.* 4*s.* for principal money on a bill of exchange, dated *October* 2nd 1843, due 5th *February* 1844, and specified in the affidavit after mentioned. For the recovery of that debt the defendants instituted proceedings under stat. 5 & 6 *Vict. c.* 122., as after detailed.

On *February* 7th, 1844, defendants served *Bradshaw* with particulars of demand, and a notice requiring pay-

ment of the said debt of 149*l.* 4*s.*, in the form specified in stat. 5 & 6 *Vict. c.* 122., sched. A., No. 2 (*a*). And, on *February* 8th, they filed an affidavit in the Court of Bankruptcy (*Bradshaw* residing within the jurisdiction), in the form specified in sched. A., No. 1 (*a*). On the same 8th *February*, a summons, in the form specified in sched. A., No. 3 (*a*), was issued under the hand of a Commissioner at the instance of the defendants, and served upon *Bradshaw*. It stated that *Bradshaw* was thereby required to appear before the Court of Bankruptcy, the purpose being to ascertain whether or not he admitted the demand of the defendants, who claimed of him 149*l.* 4*s.* for a debt, or any or what part thereof, or whether he verily believed that he had a good defence to the said demand, or to any and what part thereof.

On *February* 15th, 1844, the admission, hereinafter set forth, of the said debt or demand was made and signed by the bankrupt elsewhere than before the said Court of Bankruptcy, with reference to the provisions of stat. 5 & 6 *Vict. c.* 122. *s.* 17.; there being then present on behalf of the said *James Bradshaw*, Mr. *Daniel Davies*, an attorney &c. (The case stated the presence and attestation of an attorney, conformably to the last mentioned clause.) The admission was as follows (*b*).

(*a*) Referred to by sect. 11.

(*b*) Stat. 5 & 6 *Vict. c.* 122., "for the amendment of the law of bankruptcy," enacts (*s.* 12.): "That, upon the appearance of any such trader so summoned as aforesaid, it shall be lawful for such court to require such trader to state whether or not he admits the demand of such creditor so sworn to as aforesaid, or any and what part thereof, and if such trader shall admit such demand or any part thereof to reduce such admission into writing, in the form specified in the schedule hereunto annexed (B. No. 1.), and such admission so reduced into writing such trader is hereby required to sign, and the same is thereupon to be filed in such court." The

"I, the undersigned *James Bradshaw*, of 13 *Mary-le-Bone Street*, in the county of *Middlesex*, do hereby confess that I am indebted to Messrs. *Rhodes & Crucknell*,

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same clause empowers the Court to allow the trader on his appearance to make a deposition (which shall be filed) in the form specified by sched. B., No. 2., "that he verily believes he has a good defence to the said demand, or to some and what part thereof."

Sect. 13 enacts: That if any such trader so summoned as aforesaid shall not come before such Court at the time appointed (having no lawful impediment &c.), "or if any such trader, upon his appearance to such summons," "shall refuse to admit such demand, and shall not make a deposition, in the form hereinbefore mentioned, that he believes he has a good defence to such demand, then," "if such trader shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovering the same," with costs &c., "every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit" (as mentioned in *s.* 11).

Sect. 14 enacts: "That if any such trader so summoned as aforesaid upon his said appearance shall sign an admission of such demand in the form aforesaid, and shall not, within fourteen days next after filing of such admission, pay, or tender and offer to pay, to such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit."

Sect. 15 enacts: "That if any such trader so summoned as aforesaid shall upon his said appearance sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form hereinbefore required that he believes he has a good defence to the residue of such demand, then and in such case, if such trader, as to the sum so admitted, shall not, within fourteen days next after the filing of such admission, pay, or tender and offer to pay, to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within fourteen days after personal service of such summons, or within such enlarged

of , in the sum of one hundred and forty nine pounds. Dated the 15th day of *February*, 1844.

"Witness *Daniel* *James Bradshaw*."

"*Davies*, Attorney," &c.

The admission was, on the same day, duly filed. No further or other admission, deposition or other proceeding whatever was had, made or entered into, and no further or other step was taken in the said Court of Bankruptcy by the said bankrupt, until the said fiat issued: there was no enlargement of the time for complying with the said summons, and in fact no enlargement of time for any purpose whatever. The bankrupt (except as hereinafter appears) did not pay or tender or offer to pay, or in any manner secure or compound for,

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time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond," &c. to pay such sum as shall be recovered &c. (as in sect. 13), "every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit."

Sect. 16 enacts: That, if the trader summoned "shall, upon his appearance before such court, refuse to sign the admission in that behalf required as aforesaid, whatever may be the nature of his statement, or whether he makes any statement or not, it shall be deemed, for the purposes of this act, that every such trader thereby refuses to admit such demand." Provided always, that it shall be lawful for the Court, on reasonable cause shewn, to enlarge the time for calling upon the party to state whether or not he admits &c.

Sect. 17 enacts: "That an admission of any debt made after such summons as aforesaid, and signed by any such trader elsewhere than before such court, may be filed in such court, and shall be of the same force and effect to all intents and purposes as an admission signed by such trader so summoned as aforesaid on his appearance in such court," provided there be present some attorney named by and attending at the request of such party, to inform him of the effect of such admission, and that such attorney subscribe his name as a witness, &c., and that such admission be made in the form of the annexed schedule (C).

the said debt of 149*l.* 4*s.* or any part thereof; nor did he at any time enter into, nor has he at any time entered into, any bond to pay such sum as should be recovered in any action brought or to be brought for the recovery of the said debt of 149*l.* 4*s.* or any part thereof, together with such costs as should be given in such action, or any bond in any way relating to the said debt or a part thereof, or to any action for the recovery of the same or any part thereof; nor did he in any manner, except as herein appears, comply with the provisions of the said statute.

On 8th *February*, 1844, the same day on which the said summons was issued, the defendants commenced an action in this Court against the bankrupt for the recovery of the amount of the said bill of exchange, and other monies alleged by them to be due from the bankrupt. An appearance according to the statute was entered for the defendant by the plaintiffs' attorney; the declaration was filed; and, on 17th *February* 1844, notice of declaration was served.

The case then stated a correspondence, in which the attorney for the then defendant, being urged to proceed by the attorneys for the then plaintiffs, proposed (*February* 21st) "to pay the amount of debt and costs by instalments of 50*l.* per week until the whole is paid:" and the attorneys for the then plaintiffs replied (*February* 23d): "The plaintiffs, before proceedings were commenced, offered the defendant time upon security: they decline any other terms."

On 29th *February* 1844, the bankrupt, accompanied by the then plaintiff Mr. *Rhodes*, went to the Chambers of Messrs. *Millard* and *Adams* (the attorneys for the then plaintiffs). The bankrupt, Mr. *Rhodes*, and his at-

torney Mr. *Adams*, were present. The bankrupt offered to give a Judge's order for the amount due from him to *Rhodes & Crucknell*, including a bill of 55*l.* which would become due to them on the following *Monday*, payable by instalments of 50*l.* per week; and also to deposit with *Rhodes & Crucknell* six bills of exchange which he the bankrupt then produced. Nothing was said by either party about the odd money. The costs, including the costs in bankruptcy, were to be paid down: the amount of the costs was not mentioned. The bankrupt delivered the six bills of exchange to Mr. *Adams*, who consulted with his client Mr. *Rhodes* as to their value. Mr. *Adams* asked the bankrupt whether his attorney Mr. *Davies* was aware of the proposition he the bankrupt had made: the bankrupt said he had Mr. *Davies*'s authority to make the proposition. Mr. *Rhodes*, in the presence of Mr. *Adams* and of the bankrupt, agreed to accept the deposit of the bills, and agreed to the terms proposed. The bankrupt asked Mr. *Adams* whether the bankruptcy proceedings would be stayed. Mr. *Adams* replied that of course the bankruptcy proceedings went for nothing. The bankrupt gave the six bills to Mr. *Adams* for the purpose of his keeping them for his clients *Rhodes & Crucknell*: but Mr. *Adams* delivered the six bills of exchange back to the bankrupt, and said that, as a matter of professional etiquette, he wished that the bills should be delivered to him through the bankrupt's attorneys, Messrs. *Davies & Son*, and let Messrs. *Davies & Son* send him the bills. Mr. *Rhodes* was present during the whole of the interview. No time was mentioned when the bills were to be sent by *Davies & Son* to Mr. *Adams*. The bankrupt took the six bills on the same day to his attorneys Messrs.

Davies & Son; and, on the same 29th *February*, *Davies & Son* received the bills from the bankrupt.

On 29th *February* 1844, the attorneys for the then plaintiffs wrote to *Davies & Son*, the attorneys for the bankrupt: "The plaintiffs will agree to the following terms. Six bills to be deposited as a collateral security; the costs to be paid down, including the summons in bankruptcy. A Judge's order to be given as follows: 55*l.* (being another bill due next *Monday*) to be paid on this day, and 50*l.* every consecutive *Monday*, with interest, until the whole be paid. If you will send the summons this afternoon we will consent."

And, on *March* 1st, the attorneys for the then plaintiffs wrote to *Davies & Son*:

"We enclose costs, which it will be better to agree upon; and also a copy of the terms of the proposed order; and, if you will be good enough to send the bills to the Judge's Chambers to-morrow morning at the return of the summons, we will give the consent, and the matter will be completed. Yours truly,

"*Millard & Adams.*"

"On payment of debt and costs as follows.

55*l.* part of debt, and 12*l.* costs, as agreed, on *Monday* next, 4th *March*.

	£	s.	d.
	49	4	0
Interest on 149*l.* 4*s.* from 4th *February* to *March* 11 - - -	0	14	8
	49	18	8,

further part of debt, on *Monday*, 11th *March*.

Interest on 100*l.*, from 11th *March* to 18th *March*, 1*s.* 11*d.* -	50	1	11	on

Monday the 18th *March* next.

On 50*l.* from 18th *March* to 25th, 1*s.* - £50 1 0, residue of debt, on *Monday*, 25th *March* next.

And, in default of any one payment of the said debt and costs, the plaintiffs to have judgment and execution" &c.

The attorneys for the bankrupt took out a summons (*March* 1st), to obtain a Judge's order in pursuance of the agreement, and, on *March* 2nd, sent the following letter to the then plaintiffs' attorneys, enclosing the six bills of exchange. "We beg to enclose you summons to stay this action. We have filled in the costs at 12*l.* We enclose you also the six bills of exchange, to be deposited as a collateral security as agreed; and, on receiving your consent, will draw up the order; and the defendant will be prepared, we believe, to pay the costs on *Monday*."

The Judge's order was drawn up, and handed to the defendants, on *March* 2d, 1844. It directed "that, upon payment of the debt due from the defendant to the plaintiffs for which this action is brought, together with 12*l.* costs, to be paid as follows, viz. 55*l.* part of the debt, and 12*l.* costs, on *Monday* next the 4th *March*, 49*l.* 18*s.* 8*d.* on the 11th *March*, and 50*l.* 1*s.* 11*d.* on the 15th *March*, and 50*l.* 1*s.*, residue, on 25th *March*, 1844, all further proceedings in this cause be stayed:" in case of default made in payment as aforesaid, plaintiff to be at liberty to sign final judgment, and issue execution for the amount, with costs &c.

The bankrupt paid 55*l.* and 49*l.*, part of the amount mentioned in the order, but made default in payment of the other parts: whereupon the defendants, on *March* 23d, 1844, signed final judgment, issued a fi. fa. thereon, and delivered the same to the sheriff of *Middlesex* with

directions to levy 104*l.* 11*s.*: and the sheriff, on the same day, took certain goods of the bankrupt under the writ. The proceedings in the Bankrupt Court were instituted by the now defendants; and they had full notice of them, and of what was done therein, before and at the time of the executing and levying of the execution. The goods remained unsold when the fiat issued: and proceedings were had under the Interpleader Act before *Coleridge* J., by whom the present issue was directed.

The question for the opinion of this Court was: "Whether the facts hereinbefore stated disclose an act of bankruptcy by the said bankrupt committed before the levying of the said execution, so as to render the same invalid as against the plaintiffs: in which case the verdict is to stand for them: If not, the defendants to have their execution satisfied thereout, and a nonsuit entered."

The points for argument stated on behalf of the plaintiffs were:

"That the defendants' execution, being after an act of bankruptcy, was void as against the plaintiffs as assignees. That *James Bradshaw*, the bankrupt, committed an act of bankruptcy by not admitting all the debt on the 15th *February* 1844, but omitting a portion from his then admission. That he subsequently committed an act of bankruptcy by not arranging to the satisfaction of the defendants for the sum admitted. That the provisions of stat. 5 & 6 *Vict. c.* 122., *s.* 11. and the following, were not complied with by the said *J. B.*"

On a former day of the term (*May* 29th), the case was called on, and, the plaintiffs' counsel being absent,

Watson, for the defendants, stated the argument on their part as follows. As to the first point: *Bradshaw* did sign an admission within the meaning of stat. 5 & 6 *Vict. c.* 122. *s.* 17.: sect. 16 does not apply: and the mere omission of 4*s.* out of the sum of 149*l.* 4*s.* was not such a refusal to admit as constitutes an act of bankruptcy under sect. 13 if the party fails to pay or compound within the time there specified. Nor did his signing an admission of 149*l.* amount to an admission for part of the demand, within sect. 15. The form of such an admission, given in sched. B. No. 1 (referred to by sect. 12 of the statute), is: I confess that I am indebted &c., "in part of the said sum of pounds, that is to say in the sum of pounds." But the variance here is mere mistake; as if the party had made his admission in Court, and the clerk, in drawing it up, had left out the 4*s.* As to the second point: *Bradshaw* has, within fourteen days next after the filing of his admission, namely, on *February* 29th, compounded to the satisfaction of his creditors the now defendants, according to sect. 14. The six bills of exchange were not handed over on that day; but the arrangement was complete; and the delivery of the bills was postponed only because the attorney for the now defendants thought it consistent with professional etiquette to receive them from *Bradshaw*'s attorneys and not from himself. A suspension like this, by consent of the creditor's agent, cannot make the debtor a bankrupt. In *Ex parte Musgrove*(*a*), in the Court of Review, a similar point arose: "before the fourteen days had elapsed" (as *Bruce* V. C. stated the case in his judgment), "and while the law allowed the trader the power of pre-

(*a*) 3 *Mont. Deac. & De Gex*, 386.

venting the inchoate act of bankruptcy from becoming complete, the petitioning creditors, through error, took a step, which, at the very least, interposed very great doubt embarrassment and difficulty in the way of the alleged bankrupt doing what the law allowed him to do, for preventing an act of bankruptcy from taking place:" and His Honour added: "Without therefore saying, whether, in point of legal strictness, an act of bankruptcy has, or has not, in fact been committed (a point on which I entertain an opinion), and without deciding what is the true construction of the 6 *G.* 4. *c.* 16. *s.* 8., I think, considering the principles by which the Court is guided in exercising its discretionary jurisdiction to annul fiats, that it would be its duty to annul a fiat, which might be issued by these petitioning creditors, founded upon such an act, or supposed act, of bankruptcy." If the assignees here could succeed because the fourteen days had elapsed before the arrangement with the creditors was quite complete, a creditor, having once commenced proceedings under the statute, could not prevent an act of bankruptcy from taking place even if he wrote a letter declaring expressly that he wished to go no farther. The opinion which the Vice Chancellor forbore to state in terms may easily be conjectured. [Lord *Denman* C. J. I should rather think it must have been against you.] The principle now contended for has been recognised in cases under stat. 1 & 2 *Vict. c.* 110. *s.* 8., where the creditor has consented to the suspension of a payment by which an act of bankruptcy would have been avoided: *Ex parte Budd* (*a*), *Ex parte Gratton* (*b*), *Ex parte Brown* (*c*).

(*a*) 1 *Mont. Deac. & De Gex*, 436. (*b*) 2 *Mont. Deac. & De Gex*, 401.
(*c*) *Mont. & Chitt.* 177, 222, 227.

[Lord *Denman* C. J. As far as we can form an opinion without hearing the other side, we are with you.]

Willes was now heard for the plaintiffs. First, the admission here (if any) was made as to a part only of the debt; and therefore *Bradshaw* should have proceeded as sect. 15 directs in such a case, by paying, securing or compounding for the part admitted, and deposing that he had a good defence as to the residue, and giving a bond to pay so much of it as should be recovered in an action. [*Patteson* J. The admission, to be such as you represent, must be of part, as part. You cannot seriously argue that an accidental omission of 4*s.* is to make the provision applicable which relates to an admission of part. Admitting part is intentionally separating that part from the rest.] Perhaps a fiat issued on an act of bankruptcy grounded on such a mistake as this would be annulled by the Court of Review; but that would be only on grounds of equity, which the bankrupt might allege, but a creditor could not. In *Smith's Merc. Law*, 519 (*a*), B. 4. c. 3. s. 2., acts of bankruptcy are divided into two classes; one in which the intent is material, the other in which it is not. Here the act is of the latter class. It depends on the express words of stat. 5 & 6 *Vict. c.* 122.: and the question is not with what animus things have been done, but whether the facts bring the case literally within the statute. And, if the trader, as in this case, has admitted part of a debt, and not done what the statute (sect. 15) directs as to the residue, the Court will not enquire whether the residue was large or small. If this be so, there was an act of bankruptcy completed by the attempt at arrangement,

(*a*) 4th ed, by *Dowdeswell*.

and failure on *February* 21st and 23d. At all events an act of bankruptcy was completed on *March* 1st, by *Bradshaw* not having, at any prior time, paid, secured or compounded for the admitted demand. It is answered first, that, if there was a default in this respect, *Rhodes & Crucknell*, by their own conduct, waived the right to take advantage of it. But, admitting that to be so, and that the Court of Review would have set aside a fiat issued at their instance, as contrary to good faith, their waiver cannot preclude other creditors from the benefit of the act of bankruptcy; and the fiat here is sued out, not by them, but by *Cyrus Jay*. Then, however, it is contended, secondly, that, even if the waiver by *Rhodes & Crucknell* is not an act which can affect the other creditors, there was, in fact, on *February* 29th, such a compounding as will satisfy sect. 14. But what then took place was only an arrangement for something to be done afterwards. The Judge's order was not given, nor the bills deposited, till the 2d of *March*, more than fourteen days after the filing of the admission. At the expiration of that time it was uncertain whether the order would be given, or the deposit made, at all. There was, at that period, if ever, a complete act of bankruptcy under sect. 14. There could not be a conditional act of bankruptcy. At the end of the fourteen days *Rhodes & Crucknell* were entitled to issue a fiat within two months: and, even if they were debarred from it, other creditors were not. This is consistent with the Vice Chancellor's expressed opinion in *Ex parte Musgrove* (*a*): and the opinion which he forebore to express on the point, whether or not an act of bankruptcy had been committed, seems to have been in favour of the present plaintiffs. At least he did not pronounce a con-

(*a*) 3 *Mont. Deac. & De Gex*, 386.

trary one, though it would at once have decided the question he was then discussing. The words of sect. 14 are "if any such trader" "shall not" pay, &c., "the amount of such demand, or secure or compound for the same to the satisfaction of the creditor." "Secure" and "compound" are used in distinct senses, and answer to the expressions "composition or security for such composition" in stat. 6 G. 4. c. 16. s. 133. In the present case there was neither a securing nor a compounding. Under stat. 1 & 2 *Vict.* c. 110. s. 8. (which enacts that, if a debtor, after certain proceedings and notice, shall not within twenty one days pay or secure or compound for the debt, or enter into a bond, to be approved of by a Commissioner of the Court of Bankruptcy, to pay such sum as shall be recovered in an action to be brought for the same, he shall be deemed to have committed an act of bankruptcy on the twenty second day after notice) it was held, in *Ex parte Gooddy* (*a*), that an act of bankruptcy was committed where the debtors had executed a bond within twenty one days, but the Commissioner's approbation had not been given till the twenty third day. In *Ex parte Brown* (*b*), which turned upon the same clause, it was held that non-payment of the debt within twenty one days was no act of bankruptcy, because the debtors had signed an unconditional agreement to convey all their property to the creditors: it was (as said in the judgment (*c*)) "an absolute agreement to convey all the property they had in the world, and to ask for nothing on the other hand in return but a release on condition they gave all up." Nothing less would have satisfied that clause, or can meet the clause now in question, than

(*a*) 1 *Mont. Deac. & De Gex*, 677.
(*b*) *Mont. & Chitt.* 177.
(*c*) *Mont. & Chitt.* 228.

such an absolute security as did not require and could not be affected by any subsequent act. [*Patteson* J. If there had been a composition deed, with an undertaking to pay so much in the pound at some time after the fourteen days, do you say that that would not have been a composition?] It is not necessary to contend so. But the agreement must be such that the creditor is satisfied at the time, and nothing further remains to be done for that purpose. [*Patteson* J. That is a securing.]

Watson, contrà, was stopped by the Court.

Lord DENMAN C. J. I have heard nothing which alters my first impression. The language of the statute is very simple. Two points arise: first, whether *Bradshaw* refused, wholly or in part, the admission mentioned in sect. 12; and I think he clearly did not. Secondly, whether he compounded within fourteen days after filing the admission: that is, whether he, within that time, made such a bargain with his creditors that they were then satisfied by what they hoped to obtain afterwards. On this also I think the defendants are entitled to succeed.

PATTESON J. As to the first point: I cannot be persuaded that because a party has omitted four shillings in his admission of debt, not as refusing to include it, but accidentally, an act of bankruptcy is committed if he does not do what the act requires of persons making partial admissions. To establish this, I think (notwithstanding the form in the schedule (*a*)), it must be distinctly shewn that he really intended to deny the rest of the debt. As to the other point, the question turns

(*a*) Sched. B. No. 1. Sched. C.

entirely on the transaction which took place on the 29th of *February*: the abortive attempt at negotiation on the 21st was hardly relied upon. It may be, as Mr. *Willes* has argued, that *Rhodes & Crucknell* might be concluded by the proceedings of the 29th, and other creditors not: I do not say how this might be. But, on the 29th, a definitive arrangement took place between *Rhodes & Crucknell* and *Bradshaw*. He delivered the six bills of exchange to them on that day; but they were handed back on account of professional etiquette. That he did not "secure" payment of the debt before *March* 2d may be true, if the Judge's order and actual delivery of the bills were the security. But, as to compounding, though Mr. *Willes* says that that means the completing of an arrangement, I do not see why such a construction must be adopted. I think that, under the statute, compounding is an arranging with the creditor to his satisfaction. If there is a binding arrangement for discharge of the debt, from which neither party can recede, and with which the creditor is satisfied, it is a compounding, though something still remains to be done. And here such an arrangement had taken place on the 29th of *February*. Therefore I think there was no act of bankruptcy on the fifteenth day after the admission.

WILLIAMS J. I am of the same opinion. The omission to notice the 4*s*. in the sum of 149*l*. 4*s*. did not amount to a partial admission within the meaning of the statute. I think the admission was in fact meant to comprehend the whole debt. As to the second point; sect. 14 requires that the debtor, within fourteen days after filing his admission, shall pay or tender to his creditor the amount of the debt, "or secure or com-

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pound for the same" to his satisfaction. To "pay" is a requisition which every one understands: to "secure" implies, as my brother *Patteson* puts it, the actual giving of a security. Then, as three terms are presented in the clause, why should not the third, "compounding," mean an entering into stipulations with the creditors which they are satisfied with at the time? And here that was done on the 29th of *February*.

Judgment for defendants.

Tuesday, June 2d.

FROST *against* LLOYD and GARNER.

Avowry stated that plaintiff was an inhabitant and resiant within a manor, which had an immemorial court leet, to which he owed suit and service; that the jury of the court was sworn, according to the immemorial custom of the manor, to examine weights and measures within the manor; that they proceeded to do so, but plaintiff, while they were so proceeding, "knowingly and unlawfully obstructed the said jurors in such examination;" that the obstruction was presented, and plaintiff amerced, and defendant, as bailiff, in execution of a warrant &c. to collect the amercement, took plaintiff's goods as a distress

On special demurrer, Held:

That the nature of the act of obstruction ought to have been more specifically stated; and the avowry was therefore bad, as the presentment was not a sufficient answer in an action of replevin, without a direct averment that the fact presented took place.

REPLEVIN for taking, in a dwelling house, certain goods and chattels of plaintiff.

Avowry by *Lloyd*, and cognizance by *Garner* as his bailiff and servant. That the place in which &c. now lies, and for time immemorial hath lain, within the manor of *Clerkenwell*, otherwise called *St. John*'s *Clerkenwell*, in *Middlesex*. That one *John Hassard Short* and one *William Hood* were respectively seised in their demesne, as of fee, of and in one undivided part of the manor: that *Hood* died so seised, having devised his moiety to the use of *George Best* and *Robert Arnold Wainewright*, their executors, administrators and assigns, for the life of *Thomas Jacomb*, who is still living; and that they became seised of *Hood*'s moiety, accordingly, upon his death. That *Short* and *Hood*, while

they were so seised, and all those whose estate they had within the manor, always, from time whereof &c., and *Short*, *Best* and *Wainewright*, from the death of *Hood* always hitherto, have had and have held, and have been used and accustomed, and of right ought, to have and hold a court leet and view of frankpledge within the manor, once in every year, (that is to say) on the feast of the *Ascension* in each and every year, of all the inhabitants and resiants within the said manor, as to the said manor with the appurtenances belonging and appertaining. That, at the time of the holding of the Court, and of the committing of the obstruction by plaintiff hereinafter next mentioned, and thence until and at the time of the making of the presentment hereinafter next mentioned, plaintiff was an inhabitant and resiant within the manor, and owing suit and service to the said Court: that, before the said time when &c., and during the lifetime of *Thomas Jacomb*, (to wit) on 16th *May* 1844, the said day being the day of the Feast of the *Ascension* aforesaid, the said court leet was in due manner, and according to the custom of the said manor, held within and for the manor, before *Henry Edward Kendall* Esq., then being one of the stewards of the said manor, and *Richard Bacon*, Gentleman, then being deputy steward of the manor: and that the said *Kendall* and one *John Wainewright* then were the joint stewards of the said manor in that behalf duly appointed by *Short*, *Best* and *R. A. Wainewright*; and that *Bacon* then was the deputy steward of the manor in that behalf, duly appointed by *John Wainewright*: and that the said Court was then, according to the usage and custom of the said manor, in due form of law adjourned: and the said jurors, (that is to say) *Edmund*

Boulter, &c. (naming twenty six), having been then, and at and during the said court, and before the said adjournment thereof, duly charged and sworn as a jury for the said manor to enquire and make due presentment of all such matters and things as should be given them in charge, and particularly, according to the usage and custom of the said manor from time immemorial, to examine weights and measures used within the said manor, and see that they were just and according to the legal standards in that behalf, then had a day given them, according to the usage and custom of the said manor, to bring in their presentments upon the matters aforesaid until 29th *August* 1844, being the day to which the said court was so adjourned: that the said jurors, so charged and sworn as aforesaid, did, after the holding of the said last mentioned court, and before the day to which the same was adjourned as aforesaid, proceed, according to the usage and custom of the said manor from time immemorial used within the manor, to examine, within the said manor, the said weights and measures used within the manor; and that plaintiff, not regarding his duty in that behalf, but contriving and intending to prevent the due examination, according to the said custom, of the said weights and measures, afterwards, and *while the said jurors were proceeding as aforesaid in their examination* of the said weights and measures, according to the said custom, to wit on 27th *June* 1844, within the said manor, and within the jurisdiction of the said court, *knowingly and unlawfully obstructed the said jurors in such examination*: that thereupon, afterwards and before the said time when &c., at the said Court duly holden by such adjournment as aforesaid, on the said 29th *August* 1844,

before the said *John Wainewright*, then being one of the said stewards of the manor, and *Andrew Van Sandau*, Gentleman, then being the deputy steward of the said manor, duly appointed &c., it was presented by the oaths of the said *Edmund Boulter* &c., twenty three free and lawful men of the said jury inhabiting and residing within the said manor, and duly charged and sworn by the said Court as aforesaid to present such things as were presentable at the said Court, that the said plaintiff obstructed the said jury in the execution of the duties of the said jury in examining the weights and measures within the said manor according to the custom of the said manor: whereupon it was considered, by the said Court, that plaintiff should be amerced, and plaintiff was then duly amerced by the said Court, for his said obstruction, in the sum of 32*l.*; which said amercement &c.: averment that it was duly affeered to 32*l.*: all which said matters, done at the said Court &c., by the record &c. more fully &c. appear: of all which premises plaintiff afterwards, and before the said time when &c., to wit on &c., had notice, and was then required by defendant *Lloyd*, who was then and ever since hath been bailiff of *Short*, *Best* and *R. A. Wainewright*, of their manor aforesaid, to pay the said 32*l.*; which plaintiff refused to do: and, because the said amercement, at the said time when &c., remained wholly due and unpaid, defendant *Lloyd*, then being such bailiff &c., and as such bailiff, acting by virtue and in execution of a certain warrant to him directed, made, signed and sealed before the said time when &c., to wit on 10th *December* 1844, by the said *H. E. Kendall* and *J. Wainewright*, then being the stewards of the

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Court and manor aforesaid, whereby defendant *Lloyd* was, among other things, willed and required by the same stewards to collect and gather the said sum of 32*l.* for the amercement aforesaid, and, in case of refusal of payment, to levy the same upon the goods and chattels of plaintiff, well avows, and *Garner*, as bailiff and servant of *Lloyd*, well acknowledges, the taking &c.; in the name of a distress for the 32*l.* &c.

Demurrer, assigning for cause (among others (*a*)), that the act of obstruction, committed by plaintiff, is not stated in the said avowry and cognizance with sufficient or any certainty, and it does not appear whose weights or measures, or what weights and measures, the plaintiff obstructed the jurors in examining, or in what manner he obstructed the jurors; and the statement in the said avowry and cognizance, that the plaintiff obstructed the said jurors, is not a statement of any fact, or of any act committed by the plaintiff, but is the statement of the opinion of the said jurors, or of the defendants; and plaintiff cannot tell what defendants intend to prove under the said allegation, and does not know how to answer the same. And that it does not appear that the said supposed offence of plaintiff was committed with force and arms, or against the peace of our Lady the Queen, or that the same was to the common nuisance or annoyance of the inhabitants of the leet, or was any nuisance or annoyance. And that the presentment of the said jurors was and is wholly insufficient to warrant the said amercement, inasmuch as it does not appear thereby on what

(*a*) The Court decided only on the objection mentioned in the text. The pleadings, except so far as relates to that objection, are not fully set out.

day or at what place, or in what manner, the plaintiff obstructed the said jury; and it does not thereby appear that the said obstruction was within the said manor, or within the jurisdiction of the said court leet, or that it was unlawful or with force and arms, or against the peace of our Lady the Queen, or that it was a nuisance or annoyance to the inhabitants of the said leet, or to the said jurors, or to any person or persons; and also that it does not appear, in or by the said avowry and cognizance, that the obstruction presented by the said jurors, and the obstruction which the plaintiff is therein alleged to have committed, were or are the same; and also for that it does not appear that the said warrant sets forth with sufficient or any certainty the cause for taking the said goods.

Peacock appeared for the plaintiff: but the Court called on

Cleasby, contrà. The ordinary form of presentment has been followed: The precedent in 2 *Scriv. Cop.*, *Appendix* 1166, 1167 (4th ed.) is not more full. The plaintiff owes suit and service, and must be presumed to have been present at the time when the jury were charged: his offence is in the nature of a contempt. It would be impossible, in many cases, to describe the obstruction correctly: it might be by gesture or word of mouth. The plaintiff here could have traversed the finding. [*Patteson* J. The objection is rather to the averment of the fact in the plea than to that in the presentment. There must have been some evidence, which would shew the particular fact.] The result may be averred, with-

out the evidence. [Lord *Denman* C. J. Perhaps, if you could rely on the presentment, this would be enough: but you are compelled to aver the fact independently.] That is certainly so, as this is an action of replevin: it would be otherwise in trespass (*a*); *Willcock* v. *Windsor* (*b*). In *Moore* v. *Wicker* (*c*) (cited in the preceding case) the record shewed only that the defendant did "obstruct the jurors" "from entering into his shop;" and no objection was taken to this.

Lord DENMAN C. J. We think that the declaration ought to shew some specific act of obstructing the jury in the discharge of their duty. The obstruction might be effected by deterring them, as well as by the use of material force: but it ought to appear in what way it was effected.

PATTESON J. Mr. *Cleasby* admits that, in this action, the presentment does not of itself furnish a defence, but that the declaration must go farther, and shew some fact authorizing the taking and detaining. What fact is shewn? That the plaintiff "obstructed" the jury. Surely the declaration must go beyond so very general an allegation.

WILLIAMS J. Suppose an issue taken on the allegation, ipsissimis verbis: would it not be very difficult to enquire into the general fact of obstruction or no obstruction? Supposing there was no obstruction by

(*a*) See 2 *Scriv. Cop.* Part III. ch. 22. p. 709. (4th ed.)
(*b*) 3 *B. & Ad.* 43.
(*c*) *Andr.* 47.

force, but an act practically amounting to a clear obstruction, why should not that act be stated?

Judgment for plaintiff.

Cleasby then obtained leave to amend.

WILKINSON *against* GASTON.

Tuesday, June 2d.

ASSUMPSIT. The declaration alleged that heretofore, "to wit on the 15th day of *October* in the year of our Lord 1845," in consideration that plaintiff, at the request of defendant, would enter into the employ and service of defendant, to wit in the capacity of secretary, and serve him in that capacity for a certain time then understood and agreed upon between them, to wit from the day and year aforesaid, to wit until the

Declaration alleged that, to wit on 15th *October*, in consideration that plaintiff, at defendant's request, would enter defendant's service, and serve him for a certain time, to wit *from* the day and year aforesaid, to wit till

the service should be determined, to wit by reasonable notice in that behalf on either side, for a salary named, defendant promised plaintiff to retain and employ him on the terms aforesaid, and pay him such salary, and continue him in such service until such service should be determined as aforesaid, to wit by reasonable notice (as before): that plaintiff, *to wit on the day and year aforesaid*, entered the service of defendant on the terms aforesaid, and had always, from the commencement thereof hitherto, been ready and willing to remain and continue in the service &c., and during all that time tendered and offered himself to serve defendant in such service &c., of all which defendant during all that time had notice: yet defendant did not nor could continue plaintiff in his said service, but, on the contrary thereof, to wit *on the same day and year aforesaid*, refused to suffer plaintiff to continue any longer in the said service, and discharged plaintiff therefrom, without any previous notice in that behalf, and without any reasonable or probable cause in that behalf, and had, thence hitherto, refused any longer to retain plaintiff in his said service.

On special demurrer, Held:

(1.) That the word *from* was, on this record, to be taken as including the 15th *October* within the time of service contracted for; and it could not therefore be objected that defendant appeared to have discharged plaintiff from the service before its commencement.

(2.) That the declaration was not double for averring plaintiff's willingness to serve as well as his tender; and that issue might have been taken on the tender alone.

(3.) That the declaration was not bad for want of an allegation that plaintiff had given no notice to determine the service, there being an averment that he always was willing to serve and continually tendered himself to do so, of which defendant had notice.

said service should be determined, to wit by due and reasonable notice in that behalf on either side, at and for certain reasonable salary and wages, to wit at the rate of to wit 25*l.* per month throughout the year, defendant undertook and then promised plaintiff to retain and employ him in the capacity aforesaid, upon the terms aforesaid, and that defendant would pay plaintiff the salary and wages aforesaid, and continue him in such service and employ until such service and employ should be determined as aforesaid, to wit by due and reasonable notice in that behalf as aforesaid: That, although he, confiding &c., did afterwards, to wit on the day and year aforesaid &c., enter into the said employ and service of defendant in the capacity aforesaid, and on the terms aforesaid, and hath always, from the commencement thereof hitherto, been ready and willing to remain and continue in the said service &c. of defendant in the capacity aforesaid; and on the terms aforesaid, and during all that time tendered and offered himself to serve defendant in such service &c. and in such capacity and upon the terms aforesaid; of all which defendant during all that time had notice: yet defendant did not nor would continue plaintiff in his said service and employ, in manner aforesaid, and according to his said promise; but, on the contrary thereof, afterwards, to wit on the same day and year aforesaid, refused to suffer plaintiff to continue any longer in the said service &c., and wrongfully discharged plaintiff therefrom, without any previous notice whatever in that behalf, and without any reasonable or probable cause whatever in that behalf, and hath thence hitherto wholly neglected and refused any longer to retain plaintiff in his said service &c.: By means whereof &c. (damage averred).

Demurrer, assigning for causes, that, if the various allegations in the setting out of the contract severally preceded by the words "to wit" are to be considered as immaterial, then the contract is not set out with sufficient certainty: but, if they are considered as material, then the count is open to the following objections; First, it is not shewn, with sufficient certainty, that the alleged breach by discharging plaintiff took place after the period of service commenced, inasmuch as the period of service was from the 15th *October* 1845, which word "from" is exclusive of the last mentioned day, and the alleged discharge may have taken place on the last mentioned day; and, secondly, that the day on which plaintiff is alleged to have entered into the service and the day on which defendant is alleged to have discharged him, respectively, ought to have been days consistent with the contract, and they are respectively days which elapsed before the commencement of the period of service: And also that the discharge is the only breach alleged to have taken place without notice, which discharge does not appear to have been after the commencement of the period of service; and that the subsequent refusal to employ is not properly alleged to have been without notice: and it is uncertain what is the meaning of the expression "without any previous notice whatever in that behalf," which expression, as inserted in the count, means most naturally without any previous notice of the intended discharge, a meaning not sufficient to sustain the breach, because the service would have been equally determined by a notice given by plaintiff, and, if plaintiff did give such notice, the service was determined notwithstanding any subsequent desire on his part to continue it; and that

the count ought to have alleged with greater certainty that plaintiff gave no notice; and that the count should also have alleged with greater certainty that the refusal to employ subsequent to the alleged discharge was without previous notice by either party: And, also, that it is double to aver both that plaintiff was ready and willing, and that he tendered and offered, to serve: And, also, that the allegation of the tender and offer ought not to have been used over and above the allegation of readiness and willingness, because it tends to embarrass the defendant in his pleading.

Pashley, for the defendant. First, the declaration states that the plaintiff was discharged "on the same day and year aforesaid," that is 15th *October* 1845. As these words follow the words "on the contrary thereof," they narrow the breach, which therefore cannot be taken as simply averring that the defendant did not "continue the plaintiff in his said service and employ, in manner aforesaid, and according to his said promise;" *Harris* v. *Mantle* (*a*), *Edge* v. *Pemberton* (*b*). Now both the day averred in the breach, and the 15th *October*, to which that averment refers, are laid with a "to wit:" but, where the time is material, the averment of time, though under a "to wit," is binding; *Ring* v. *Roxbrough* (*c*). It appears then that the plaintiff was discharged on 15th *October*. But his service had not then commenced according to the contract: for it was to run "from the day and year aforesaid;" and "from" or "after" excludes the day itself; *Clayton's Case* (*d*) (where

(*a*) 3 *T. R.* 307.
(*b*) 12 *M. & W.* 187.
(*c*) 2 *C. & J.* 418; *S. C.* 2 *Tyrwh.* 468.
(*d*) 5 *Rep.* 1 *a.*

Norris v. *The Hundred of Gawtry* (*a*) is referred to), *Thomas* v. *Popham* (*b*), *Dowling* v. *Foxall* (*c*). So the word "until" is exclusive; *Wicker* v. *Norris* (*d*). So, in a description of a road, "to" indicates a terminus excluding the road itself; *Halsey's Case* (*e*). The rule must be definite and uniform, if the law is to be a science. [*Williams* J. *Rex* v. *Gamlingay* (*g*) agrees with *Halsey's Case* (*e*).] The doctrine as to time is found in 20 *Vin. Abr.* 268. tit. *Time* (A) pl. 16.; and the decision in *Lester* v. *Garland* (*h*) was the same way. [*Williams* J. Independently of authority, do you understand how there is to be such a fixed rule as you contend for? In *Hardy* v. *Ryle* (*i*), if there was less science than in the other cases, a little more sense was imported into the law.] The modern principle appears to be that the day is to be excluded; *Mercer* v. *Ogilvie* (*k*), *Webb* v. *Fairmaner* (*l*), *Gorst* v. *Lowndes* (*m*). On the other side, *Pugh* v. *Duke of Leeds* (*n*) may be relied upon. The general principle there, that the intention of the parties, to be collected from the whole of the instrument, is to be the guide, cannot be disputed. That doctrine is explained by *Kent*, in his *Commentaries*, vol. 4. p. 95. note (*b*) (5th ed). He says, "It was the old rule that a lease *commencing from the day* of the *date*, or *from the date*, began to operate the day after the date. *Co.*

(*a*) *Hob.* 139. (5th ed.)
(*b*) 2 *Dyer*, 218 *b.*; *S. C.* (*Anonymous*), *Moore*, 40. pl. 128.
(*c*) 1 *Ball & B.* 193. (*d*) *Ca. K. B. temp. Hardw.* 116.
(*e*) *Latch*, 183.
(*g*) 3 *T. R.* 513. But see, as to this case, *Rex* v. *Knight*, 7 *B. & C.* 413
(*h*) 15 *Ves.* 248. (*i*) 9 *B. & C.* 603.
(*k*) Cited in *Lester* v. *Garland*, 15 *Ves.* 254.
(*l*) 3 *M. & W.* 473. 477. See *Russell* v. *Ledsam*, 14 *M. & W.* 574. 582.
(*m*) 11 *Sim.* 434. (*n*) 2 *Cowp.* 714.

Litt. 46. b. But this rule was afterwards shaken, and *from the date*, or *from the day of the date*, may be either inclusive or exclusive of that day, according to the context or subject-matter, and the courts will construe the words so as to effectuate the deeds of parties and not destroy them." He then cites *Pugh* v. *Duke of Leeds* (*a*), and he adds: "There is no general rule on the subject, and in computing time from an act or an event, the day is to be inclusive or exclusive, according to the reason of the thing, and the circumstances of the case." And, after referring to *Lester* v. *Garland* (*b*), he says: "The tendency of the recent *English* decisions is to exclude the day of the act, unless some special reason renders it necessary to reckon it inclusive." He remarks that, in *Blake* v. *Crowninshield* (*c*), "it was truly observed" "that it would be very difficult to deduce from the cases a general rule. But," he says, "ordinarily, the day of a demise is inclusive, and to be considered in computing the time of its commencement and termination. The reason is that this construction is here used, not by way of *computation*, but of *passing an interest;* and when there is nothing else to guide the construction, that one is assumed which is most beneficial to him in whose favour the instrument is made, and an immediate interest passes." In a case decided in *Massachusetts*, *Bigelow* v. *Willson* (*d*), *Pugh* v. *Duke of Leeds* (*a*) is also commented on, and it is laid down that the exception to the general rule takes effect only where the meaning of parties is perfectly clear. Secondly, the declaration here alleges, by way of showing a performance of the condition precedent,

(*a*) 2 *Cowp.* 714.
(*b*) 15 *Ves.* 248.
(*c*) 9 *New Hampsh. Rep.* 304.
(*d*) 1 *Pickering*, 485, 495.

that the plaintiff was ready and willing to remain in the service, and also that he tendered and offered himself to serve. Such averments create duplicity: and this appears to have been the opinion of *Maule* J. in *Jackson* v. *Allaway* (*a*). Thirdly, there ought to have been an averment that the plaintiff had given no notice to determine the service: the allegation that the defendant had discharged him without reasonable notice "in that behalf" means only notice of the discharge; that is notice by the defendant.

Peacock, contrà. First, the consideration is, in effect, that the plaintiff would enter into the service of the defendant on the 15th of *October:* and the service is to be from that day; that is, not from the expiration of the day, but from the entering into the service. The intention of the parties is clear: and, that being so, the principle admitted on the other side is applicable. The declaration shews that the plaintiff had entered before he was dismissed. But, even if the argument on the other side were correct, it would be applicable only to the day of the actual discharge; whereas the declaration shews a breach continuing to the commencement of the action. Secondly, the plaintiff was bound, not only to shew that he was willing to serve, but that he actually offered to do so. *Jackson* v. *Allaway* (*a*) was decided on the ground that, under the contract there declared upon, the tender was unnecessary, so far as the allegation of it meant more than an allegation of willingness: for there it was the duty of the defendant to apply for the goods. The present case more

(*a*) 6 *M.* & *G.* 942. 950.

nearly resembles that of a declaration on a breach of promise of marriage, where a request should be averred. Thirdly, the plaintiff was not bound to negative the notice by him. If there was such notice the defendant should have shewn it; *Kingsbury* v. *Collins* (*a*).

Pashley, in reply. First, the authorities before cited shew that the breach is narrowed to the act of discharging, which determined the contract: the only question, therefore, is, whether the discharge is not laid as taking place before the service commenced. If the entering be alleged to have been according to the contract, the declaration is repugnant; if not, the breach is bad, as not referring to the contract declared upon. An ambiguity, specially demurred to, is construed against the party pleading, though it is otherwise after verdict; *Lord Huntingtower* v. *Gardiner* (*b*). Secondly, *Jackson* v. *Allaway* (*c*) appears to go beyond this case: the offer to deliver at a particular place is an act which the party might well be called upon to allege. That case is recognized in *Boyd* v. *Lett* (*d*). Thirdly, the contract here is limited expressly by the notice; so that, without negativing the notice, the continuance of the contract is in no way alleged.

Lord DENMAN C. J. As to the want of allegation that the plaintiff had given no notice, the averment that he was ready and willing to serve, and that the defendant had always notice of this, is quite sufficient. The mode of calculating the time must

(*a*) 4 *Bing.* 202.
(*b*) 1 *B. & C.* 297. 301. 303.
(*c*) 6 *M. & G.* 942.
(*d*) 1 *C. B.* 222.

depend on the circumstances of the particular contract. This fully appears from the *American* authorities which have been cited. When the plaintiff avers that he entered on a particular day, on the terms of the contract, he shews a contract such that that day was to form a part of the service. As to the duplicity, though it was necessary that the plaintiff should be ready and willing to serve, it was also necessary that he should tender his service: and a single issue taken upon the tender would be enough.

PATTESON J. This demurrer is founded upon the notion that the word "from" *must* be exclusive: otherwise, I cannot see how the demurrer can be sustained. If it is true, as the plaintiff says, that he did enter into the service on the same day on the terms of the contract, and that the defendant discharged him out of the service on that day, then the parties acted on the agreement as comprehending the day in the service. It would then not be an agreement excluding the day. It may have been a parol agreement, and its meaning a matter of evidence. The demurrer therefore is wrong, in assuming that the word *must* be exclusive; though I agree that, primâ facie, it is so. As to the supposed duplicity, the case is not within the authority cited. In all actions for discharging a party employed, there is an allegation that the party offered to continue the service: and the question turns on that allegation rather than on the willingness. As to the want of averment of notice, when the plaintiff says that he was ready and willing and offered to serve, and that the defendant had always notice of this, it would be idle for him to go on to say that he had given no notice to quit.

WILLIAMS J. The point principally relied upon is that the word "from" is exclusive. In *Rex* v. *Stevens* (*a*) the word "until" was the subject of discussion: and it was considered to admit a different interpretation according to the subject-matter and context. Supposing that the word, primâ facie, has an exclusive meaning, there is no rule that prevents us from interpreting it so as to be inclusive, if the use of the word in the transaction leads us to do so. Now here, if we advert to the whole of the count, we find an averment that the plaintiff entered into the service, on the terms of the contract, on the day itself. The contract, if so, must have included that day. To say that the word is necessarily exclusive would, I think, be erroneous. As to the question of duplicity, I observe that, in the demurrer, it is said that the allegation of readiness and willingness tends to embarrass the defendant in his pleading. But an issue denying the tender would be good.

Judgment for plaintiff.

(*a*) 5 *East*, 244.

WILLIAM PETCH and MARY his Wife, *against* JANE LYON.

Tuesday, June 2d.

DEBT. The first count stated that defendant, while the plaintiff *Mary* was unmarried, to wit on &c., was indebted to the said *Mary* in 50*l.* for interest upon, and for the forbearance by the said *Mary* to defendant, at her request, of, moneys "due and owing from the defendant to the said *Mary*."

Second count. "And in 100*l.* for money found to be due and owing from the defendant to the said *Mary* on an account then stated between them."

Pleas. 1. Never indebted. Issue thereon.

2. A plea of fraud. Replication, traversing the fraud. Issue thereon.

On the trial, before *Coltman* J., at the *Yorkshire* Spring assizes, 1845, it appeared that, while the female plaintiff was unmarried, an attorney, named *Carr*, verbally demanded, on her behalf, the sum of 100*l.* from the defendant. The defendant stated that the money had been owing, not from herself, but from her deceased husband, to a former husband of the plaintiff *Mary*: and that *Mary*'s deceased husband had given the debt to her (the defendant's) late husband. *Carr*, however, insisted on her executing a writing, which he

Defendant, a widow, being pressed to pay *M.* a debt owing from her deceased husband to the deceased husband of *M.*, signed and gave to *M.*'s attorney the following note, addressed to the attorney. "I beg you will not proceed against me for *M.*, for the sum of 100*l.* and interest, which I owe her; and I will pay the interest, amounting to 9*l.*, due on the 23d *December* next, and the principal as soon as I am able."

Held, that this did not support a count in debt for interest upon, and forbearance by *M.* to defendant, at her request, of, moneys owing from defendant to *M.*: nor a count in debt for money found to be due from defendant to *M.* on an account stated between them.

In a discussion between the attorneys of the plaintiff and defendant, touching the dispensing with certain witnesses at the trial, plaintiff's attorney stated to defendant's attorney that the debt was one owing from the late husband of defendant. Held, that such statement could not be given in evidence against plaintiff.

drew up, and which she accordingly signed. The writing was as follows.

"Mr. *Carr.*

"*Market Weighton, Oct.* 15th, 1842.

"Sir, — I beg you will not proceed against me for Mrs. *Mary Clark* for the sum of 100*l.*, and interest, which I owe her; and I will pay the interest, amounting to 9*l.*, due on the 23d *December* next, and the principal as soon as I am able.

"I am, Sir, your obedient servant,

"*Jane Lyon.*

"Witness, *Charles Carr.*"

Carr, who was called as a witness for the plaintiffs, proved these facts, and also that he was, at the time of the signature, acting as attorney for the female plaintiff. He was then asked whether he had not heard the present attorney on the record for the plaintiffs say, to the attorney for the defendant (*a*), that the debt was due from the late husband of the defendant. The question was objected to: and *Carr*, on further examination, stated that what had been said was in a conversation which had taken place on the outside of the Court, two days before the trial, in the course of a discussion between the two attorneys whether certain witnesses could be dispensed with. The learned Judge allowed the question to be put: and it was answered in the affirmative. It further appeared, from *Carr*'s evidence, that he had claimed the debt as due to the female plaintiff's

(*a*) On the argument in banc some doubt was raised whether the words were addressed immediately to the defendant's attorney, or to a third person in his presence. The Court, however, in their judgment, assumed the fact to be as stated in the text.

deceased husband from the defendant's deceased husband. It was also proved that the defendant had the means of paying the money. It was objected, for the defendant, that upon this evidence the plaintiffs could not succeed in the present form of action: and the learned Judge, being of that opinion, directed a verdict for the defendant on the first issue, reserving leave to move to enter a verdict for the plaintiffs for such sum as the Court should direct. On the second issue the verdict was for the plaintiffs.

In *Easter* term, 1845, *Knowles* obtained a rule nisi according to the leave reserved, and also for a new trial on the ground of the improper reception of evidence.

In this term (*a*),

Bliss and *Pashley* shewed cause. First, the admission by the plaintiffs' attorney was evidence. In *Gainsford* v. *Grammar* (*b*) the fact that a party was the attorney of the defendant was held to render his declarations respecting the subject of the action, made at the time of his communicating some propositions from defendant to plaintiff, evidence against the defendant, without further proof of authority. *Marshall* v. *Cliff* (*c*) is to the same effect: and the principle is illustrated by *Turner* v. *Railton* (*d*) and *Peto* v. *Hague* (*e*). It is true that the declaration here was made in the course of a casual conversation: but a discussion was going on at the time as to dispensing with certain witnesses: so that the words must be considered as uttered in the course of the communications respecting the action.

(*a*) *May* 28th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.
(*b*) 2 *Campb.* 9.
(*c*) 4 *Campb.* 133. See *Wagstaff* v. *Wilson*, 4 *B. & Ad.* 339.
(*d*) 2 *Esp. N. P. C.* 474. (*e*) 5 *Esp. N. P. C.* 134.

The case therefore comes within the rule laid down in 2 *Stark. Ev.* 30. (*a*), that, "in general, what an agent says, who is employed by another to make a proposal for him, is also evidence against the latter. So an admission by an agent, in the course of transacting the business which he is appointed to perform by the principal, is, in general, evidence against the principal." The attorney was *dominus litis* at the time of the discussion. An agreement by him to admit a specific fact would have been conclusive as to the fact; *Young* v. *Wright* (*b*), *Roscoe's Dig. Ev. N. P.* 44. (*c*). The doctrine was applied very widely in *Ashford* v. *Price* (*d*). There the defendant, an attorney, was sued for money received to the use of *H.*, whose administrator the plaintiff was, as damages in an action prosecuted for *H.* by the defendant; and the defendant gave notice of set-off for the extra costs of the former action: in answer, the plaintiff offered in evidence declarations made by the defendant's agent, when attending to tax the costs in the former action, to the effect that that action was conducted by the defendant charitably, and without charging his then client for extra costs: and this evidence was admitted. There the connection, between the action in which the evidence was offered and the occasion on which the agent made the declaration, was much more remote than here. And the declaration here was made to the attorney of the opposite party in the action; not, as there, before the action had been commenced.

Next, the evidence does not support either count. The defendant, if liable at all, should have been declared against by a special count framed on the paper of *October* 15th. The words "which I owe her" are not

(*a*) 3d ed.
(*b*) 1 *Campb.* 139.
(*c*) 6th ed.
(*d*) 3 *Stark. N. P. C.* 185.

to be taken alone: they are part of an instrument which, when taken altogether, shews only a promise to pay when the party is able: and they are consistent with a liability merely collateral: and, upon the evidence, it appeared that this was a promise to pay the debt of another. Therefore the defendant was not, properly speaking, indebted to the plaintiff for interest, as charged in the first count, nor was the money found, as charged in the second count, to be due and owing from the defendant to the plaintiff *Mary* on an account stated. In *Clarke* v. *Webb* (*a*) Lord *Lyndhurst* said: "In order to recover as upon an account stated, it ought to appear that the account was stated with reference to former transactions between the parties." Therefore an express statement of account is not conclusive, but may be shewn to relate to a transaction on which the party is not liable, or to have originated in mistake; *French* v. *French* (*b*), *Wells* v. *Girling* (*c*), *Pierce* v. *Evans* (*d*) *Thomas* v. *Hawkes* (*e*). Even a special count on the instrument could not have succeeded, under stat. 29 *C.* 2. *c.* 3. *s.* 4. No consideration is shewn for the promise: forbearing to proceed is no consideration, because, the defendant being neither the original debtor nor executrix or administratrix, no suit could have been maintained against her. This puts an end to the case on the present declaration. On the other side, reference may be made to *Barker* v. *Birt* (*g*), *Remon* v. *Hayward* (*h*) and *Roper* v. *Holland* (*i*). In *Barker* v. *Birt* (*g*) the

(*a*) 1 *C. M. & R.* 29.; *S. C.* 4 *Tyrwh.* 673.
(*b*) 2 *M. & G.* 644.
(*c*) 8 *Taunt.* 737.; *S. C.* 3 *B. Moore*, 79.
(*d*) 2 *C. M. & R.* 294.; *S. C.* 5 *Tyrwh.* 1042.
(*e*) 8 *M. & W.* 140.
(*g*) 10 *M. & W.* 61.
(*h*) 2 *A. & E.* 666.
(*i*) 3 *A. & E.* 99.

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situation of the party with whom the account was supposed to have been stated was altered; so that the case falls within the principle of *Pickard* v. *Sears* (*a*) and *Gregg* v. *Wells* (*b*); and it is on that principle alone, which is inapplicable here, that the decision can be supported. In *Remon* v. *Hayward* (*c*) the defendant had got possession of the money. In *Roper* v. *Holland* (*d*) the defendant had money in his hands when he made the statement. That explanation is given by the Court of Exchequer in *Bartlett* v. *Dimond* (*e*).

Knowles and *Hugh Hill*, contrà. First, although an admission made by an agent in the course of the execution of his agency is binding on his principal, that doctrine is inapplicable to a mere casual conversation; *Parkins* v. *Hawkshaw* (*g*). It does not appear that the declaration here was made with a view to any arrangement: but, if it was, the arrangement has not been carried into effect, and the evidence becomes inadmissible on that ground. In *Gainsford* v. *Grammar* (*h*) the attorney was making a specific proposal. In *Young* v. *Wright* (*i*) Lord *Ellenborough* draws exactly the distinction for which the plaintiff here contends. "If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission; but it is clear, that whatever the attorney says in the course of conversation, is not evidence in the cause."

(*a*) 6 *A. & E.* 469.
(*b*) 10 *A. & E.* 90.
(*c*) 2 *A. & E.* 666.
(*d*) 3 *A. & E.* 99.
(*e*) 14 *M. & W.* 49. 56.
(*g*) 2 *Stark. N. P. C.* 239. 240.
(*h*) 2 *Campb.* 9.
(*i*) 1 *Campb.* 139.

Next, the account is stated, in express terms, as in respect of money owing from the defendant to the plaintiff. It is like an I. O. U. The consideration is a forbearance to sue. [*Patteson* J. That is insufficient, if the debt to be sued for was owing from the deceased only; *Jones* v. *Ashburnham* (*a*).] In *Clarke* v. *Webb* (*b*) and *French* v. *French* (*c*) there was not, as here, an unconditional written acknowledgment of a debt between the parties to the action: *Barker* v. *Birt* (*d*) and *Remon* v. *Hayward* (*e*) have not been distinguished. With respect to the argument that the promise is conditional only on the defendant's ability, the proof, which was wanting in *Tanner* v. *Smart* (*g*), was here given, for the ability to pay was proved: the promise therefore may be treated as absolute; *Irving* v. *Veitch* (*h*). It is said that the words are consistent with a collateral liability: but a party may, by express words, convert a collateral liability into a direct one; and that has been done here.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

We are of opinion, in this case, that what was said by the plaintiff's attorney in conversation with the defendant's attorney was not receivable in evidence. It appears not to have been said as an admission of any disputed fact in the cause, but was merely a loose conversation; and, though spoken to the defendant's at-

(*a*) 4 *East*, 455.
(*b*) 1 *C. M. & R.* 29; *S. C.* 4 *Tyrwh.* 673.
(*c*) 2 *M. & G.* 644.
(*d*) 10 *M. & W.* 61.
(*e*) 2 *A. & E.* 666.
(*g*) 6 *B. & C.* 603.
(*h*) 3 *M. & W.* 90.

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torney, not to a mere stranger, yet we think the principle laid down in *Parkins* v. *Hawkshaw* (*a*) applies.

This would have been a ground for a new trial, if the case had gone to the jury: but, as it did not, we think that the present rule to enter a verdict for the plaintiff may be discharged if the other evidence in the case shews, in our opinion, that the action on an account stated cannot be sustained. Now it may be difficult to say that the memorandum in this case was not evidence of an account stated. But, as the witness who drew up that memorandum distinctly proved, on his cross-examination, that the debt was not due from the defendant herself in her own right, nor to the female plaintiff in her own right, but was a debt from the deceased husband of the one to the former husband of the other, the plaintiff failed in shewing that the defendant was *indebted* to the female plaintiff on an account stated: and this rule must be discharged.

Rule discharged.

(*a*) 2 *Stark. N. P. C.* 240.

Wednesday, June 3d.

The QUEEN *against* The Inhabitants of ST. GILES IN THE FIELDS.

Reported, 7 *Q. B.* 529.

Wednesday, June 3d.

The QUEEN *against* POCOCK.

Reported, 8 *Q. B.* 729.

The QUEEN *against* The Inhabitants of ST. ANNE, WESTMINSTER.

Wednesday, June 3d.

Reported, 7 *Q. B.* 241.

The QUEEN *against* GRIFFIN.

Wednesday, June 3d.

ON appeal against a conviction by Sir *Edmund Saunderson Prideaux*, Bart. and three others, commissioners acting in the execution of the acts relating to assessed taxes for the district of *Colyton* in the county of *Devon*, the sessions confirmed the conviction, subject to the opinion of this Court upon the following case.

On 2d *January* 1843, the appellant was convicted of the offence mentioned in the conviction (*a*), of which the following is a copy.

"*Devonshire* (to wit). Be it remembered that, on the 2nd day of *January* A. D. 1843, at the parish of *Colyton*, in the district of *Colyton*, in the county of *Devon*, *James Griffin*, of" &c., "labourer, was duly convicted by us of having within three calendar months next before the making of the information and complaint herein, to wit on" &c., "at the said parish" &c., "used a gun and dog for the purpose of then and there taking and killing game, without having obtained such certificate as is directed by the statute" &c. "in order to an assessment" &c.; "contrary to the form of the statute in that case made and provided; and adjudged to pay the sum

The provision in the General Conviction Act, 3 *G.* 4. *c.* 23. *s.* 2., that, in all cases where two or more justices, deputy lieutenants or others, are authorised to hear and determine any complaint, one justice, &c. shall be competent to receive the original information, does not repeal provisions of former statutes, expressly requiring more than one justice, &c., to receive an information. Therefore, a conviction on an information laid before a single commissioner of assessed taxes (not being a justice), under stat. 52 *G.* 3. *c.* 93. Sched. (L.) Rule 13., is bad.

(*a*) Under stat. 52 *G.* 3. *c.* 93. Sched. (L.) Rules 12, 13.

of 10*l.* for his said offence. Given under the hands and seals of Sir *Edmund Saunderson Prideaux*, Bart., the Rev. *Richard Lewis* the younger, clerk, *Edward Guppy* and *Matthew Liddon*, Esqs., being commissioners acting in the execution of the acts relating to assessed taxes for the district of *Colyton*, in the said county of *Devon*." Signed and sealed by the above named commissioners.

It was objected, on the trial of the appeal, that the conviction was bad on the face of it, inasmuch as it did not appear thereby that any information or complaint of the offence having been committed within the district where the commissioners acted had been made to them, or any one of them, before they summoned the person accused to appear before them. Neither did it appear thereby that they, or any of them, had summoned the person accused to appear before them within three calendar months after the offence was committed. The information had been made to a single commissioner of assessed taxes (not being a justice of the peace); and the summons had been issued by him alone: the conviction was signed by him and three other commissioners. These facts also were made grounds of objection. The sessions overruled all the objections, and confirmed the conviction.

The question for the opinion of this Court was: Whether the conviction was invalid on any of these grounds of objection. If the Court should be of opinion that the conviction was invalid, the order of sessions and conviction were to be quashed; if otherwise, to be affirmed.

J. Greenwood in support of the order of sessions. 1. The conviction is good on the face, following the

form given by stat. 52 G. 3. c. 93. Schedule (L.), Rule 15. 2. The only other material objection is founded on Rule 13 of the same schedule, which enacts that it shall be lawful for any two commissioners for executing the act, or for any one justice of the peace being also a commissioner, "upon information or complaint to him or them made," to summon &c., hear and determine the matter, and give judgment for the penalty. Here, the information was laid before a single commissioner only. But that commissioner was also one of the convicting commissioners: therefore the objections taken in *Jones* v. *Gurdon* (*a*) and *Regina* v. *Wilcock* (*b*) did not arise: And, this being the case, the enactment of the general conviction act, 3 G. 4. c. 23. s. 2., applies, that, "in all cases where two or more justices, deputy lieutenants or others, are authorised and required to hear and determine any complaint, one justice, deputy lieutenant or such other person shall be competent to receive the original information and complaint, and to issue the summons."

Merivale and *Cornish*, contrà. 1. The statement of the offence, left blank in the form given in the statute, is incomplete, for want of shewing certain facts essential to give the commissioners jurisdiction, of which no intendment can be made; *Rex* v. *Hazell* (*c*), *Rex* v. *Nield* (*d*). 2. Even if stat. 3 G. 4. c. 23. applies to the case of justices of the peace proceeding under stat. 52 G. 3. c. 93., it does not apply to that of commissioners of assessed taxes, who are not named in it, and who cannot be comprehended under the general term "others,"

(*a*) 2 Q. B. 600.
(*b*) 7 Q. B. 317.
(*c*) 13 *East*, 139.
(*d*) 6 *East*, 417.

which extends only to persons ejusdem generis with those named before; *Sandiman* v. *Breach* (*a*), *Kitchen* v. *Shaw* (*b*). But the statute does not apply. Its object was, not to alter the mode of procedure under existing statutes, but merely to direct in what manner proceedings should be had where there was no such mode provided. It had been made a question, whether, where two justices are required to convict, one could receive the information, there being no special enactment empowering him (*c*). And it was to meet cases of this description that the statute was passed.

Lord DENMAN C. J. I do not think that the statute 3 *G.* 4. *c.* 23. *s.* 2. was intended to repeal, or has the effect of repealing, the direct provision of stat. 52 *G.* 3. *c.* 93. The conviction, therefore, is bad, as founded on an insufficient information.

PATTESON J. I think the interpretation put by Mr. *Merivale* on stat. 3 *G.* 4. *c.* 23. *s.* 2. is the correct one: namely, that it provides for ordinary cases, where two justices are required to hear, by enacting that in such cases one only shall be required to take the information; but does not extend to cases where by former statutes, a specified number of justices, or other persons within the meaning of the act, was required for that purpose.

WILLIAMS J. concurred.

Order of sessions quashed (*d*).

(*a*) 7 *B.* & *C.* 96. 100. (*b*) 6 *A.* & *E.* 729. 734.
(*c*) *Dalton's Just.* p. 24. Ed. 1655., *Paley on Convictions*, p. 23. 3d ed.
(*d*) Reported by *H. Merivale*, Esq.

The QUEEN *against* The Justices of RADNORSHIRE.

Thursday, June 4th.

Two justices of the county of *R.*, assuming to act under stat. 9 *G.* 4. *c.* 40., directed the parish officers of *H.*, in that county, to pay certain sums to the keeper of a house for the reception of insane persons in the county of *S.*, for the maintenance of an insane person, whose settlement they, by the same order, adjudged to be in *H.* *H.* made payments under this order, but appealed: the order was confirmed at sessions; but, on a case reserved, the orders of justices and of sessions were quashed by this Court, on the ground that the two justices of *R.* had no jurisdiction.

Held, that this Court could not award a mandamus, calling upon the justices of *R.* to direct their county treasurer to repay to *H.* payments which that parish had made under the first-mentioned order from the time of its being granted to the time of its being quashed.

UNDER stat. 9 *G.* 4. *c.* 40., two justices of *Radnorshire*, by order of 30th *November* 1843, adjudged the settlement of *J. P. Wood*, an insane pauper, to be in the parish of *Heyop*, in that county, and ordered the overseers of *Heyop* to make certain weekly payments to the keeper of a licensed house for the reception of insane persons at *Shrewsbury*, in *Shropshire*. He had been placed in this house by virtue of a previous order, of 13th *November* 1843, directed to the parish officers of the parish of *Knighton*, in *Radnorshire*, to which he was then chargeable, his settlement having then been inquired into, but not ascertained. On appeal against the order of 30th *November*, at the *Radnorshire* Quarter Sessions, the sessions confirmed the order, subject to a case: but this Court, in last *Hilary* vacation, quashed both orders, on the ground that the justices of *Radnorshire* had no jurisdiction to make the order on *Heyop* (*a*).

In *Easter* term, *Pashley* obtained a rule nisi for a mandamus, commanding the justices of *Radnorshire* to order to be paid to the churchwardens and overseers of *Heyop*, out of the county stock or rates of *Radnorshire*, 50*l.* 12*s.*, the amount of moneys paid by the parish officers of *Heyop* for the maintenance &c. of *Wood*, in

(*a*) See *Regina* v. *Heyop*, 8 *Q. B.* 547.

pursuance of the order of 30th *November*, between 30th *November* and 31st *January* last.

E. V. Williams now shewed cause. There is no precedent for such an application as this: and stat. 9 *G.* 4. *c.* 40. contains nothing to authorise it. It is not even true that the county was primarily liable to the expenses. Sect. 38 throws the expenses on the parish where the pauper is settled, if the justices ascertain that at the time of the removal: if it is not ascertained, the county treasurer must defray them, under sect. 41, if the justices so order: if it is ascertained afterwards, the parish must repay the charges incurred by the county; sect. 42. Here the justices have made no order under sect. 41, the only clause rendering the county liable. The parish of *Heyop* has been ordered to pay the expenses; it now turns out that the order is void, not on the merits, but for want of jurisdiction: the case on behalf of that parish is, therefore, that they have paid money under a void order.

Pashley, contrà. There is no express clause in the statute authorising the sessions to make the order; but, on general principles, if the county be primarily liable, it ought to refund the money which the parish has been compelled to pay. The primary liability of the county appears from sect. 41, and from the language of the judges of this Court in *Regina* v. *Darton* (*a*) and *Regina* v. *The Justices of Kent* (*b*). Then, the money having been paid, to avoid an indictment, under an order, afterwards declared illegal, the parish is entitled to have

(*a*) 12 *A. & E.* 78. (*b*) 2 *Q. B.* 686.

it back from the party really liable; *Feltham* v. *Terry* (*a*), which was a case of payment under a conviction afterwards quashed. The order having been quashed, for whatever cause, the settlement must be taken as not ascertained; *Regina* v. *Pixley* (*b*). [*Patteson* J. The difficulty here is, that no order has been made on the county treasurer, under sect. 41. The original order of 13th *November* seems to be still subsisting.] The case in some degree resembles that of surgical relief given to a pauper without express retainer from the parish, as in *Lamb* v. *Bunce* (*c*) and *Tomlinson* v. *Bentall* (*d*), which cases are cited in note (*e*) to *Barber* v. *Fox* (*e*); and it there appears to be assumed that, if money be necessarily paid by one party which ought to have been paid by another, that other will be held liable though no step for enforcing the original liability was taken in the first instance. *Wing* v. *Mill* (*g*) and *Paynter* v. *Williams* (*h*) illustrate the general principle of obligation. Or the case may be compared to those in which a husband has been held liable to pay for sustenance provided by another for his wife because the husband was bound to sustain her. [*Patteson* J. The legislature clearly intended the payment to be made by the parish where the settlement was: and that they supposed would be ascertained, if at all, within twelve calendar months.] But the primary duty is thrown on the county. [*Patteson* J. How have the Sessions for *Radnorshire* any jurisdiction here? They obtain whatever jurisdiction they exercise by appeal.]

(*a*) Cited in *Lindon* v. *Hooper*, 1 *Cowp.* 419; and in *Birch* v. *Wright*, 1 *T. R.* 387.

(*b*) 4 *Q. B.* 711.

(*c*) 4 *M. & S.* 275.

(*d*) 5 *B. & C.* 738.

(*e*) 2 *Wms. Saund.* 137*f*. 6th ed.

(*g*) 1 *B. & Ald.* 104.

(*h*) 1 *C. & M.* 810; *S. C.* 3 *Tyrwh.* 894.

The appeal was made here: after that, the sessions are in possession of the question: otherwise there is no remedy. The law, in analogous cases, always provides a remedy, as in the instance of a writ of restitution. [*E. V. Williams* referred to *Rex* v. *Moor Critchell* (*a*).] The authority of that case may be questioned: it has been overruled, as to one point, in *Rex* v. *St. Mary's, Leicester* (*b*).

Lord DENMAN C. J. In the cases of *Wing* v. *Mill* (*c*) and *Paynter* v. *Williams* (*d*) there were express recognitions of the liability. If there were any case where a parish which had incurred expense through the mistake of another party had been relieved by mandamus from this Court, such a case might furnish some analogy here. But, if that practice could prevail, we might be called upon to grant a mandamus in the nature of a writ of restitution wherever casual poor had been relieved, and the settlement had afterwards been ascertained. There appear to me to be no means of setting right the mistake which has occured here.

PATTESON J. Argue as you will, the case comes to this. The justices made a mistake in the original order of the 13th of *November*: can that be set right? By sect. 41, two justices, by order directed to the treasurer of the county, may direct that the charges of removal and maintenance shall be satisfied out of the county rates. Here, the justices have omitted to give such

(*a*) 2 *East*, 66, 222.
(*b*) 1 *B. & Ald.* 327. See *Regina* v. *Casterton*, 6 *Q. B.* 507.
(*c*) 1 *B. & Ald.* 104.
(*d*) 1 *C. & M.* 810; *S. C.* 3 *Tyrwh.* 894.

direction. I do not see what power we can have by mandamus over the sessions or the county. The statute, of course, has not provided for the case of magistrates not doing their duty.

WILLIAMS J. The case is, in substance, disposed of by the admission of counsel. We ought to have had some authority for holding that the justices of *Radnorshire* had the power to make an order for payment to the overseers of *Heyop* out of the county fund. Something like an approximation may be made to this by general analogies: but there is nothing like an authority under this statute. The case, therefore, comes to this. The parish of *Heyop* has paid a sum which it was not bound to pay; and therefore, it is said, we ought to grant a mandamus for the purpose of relieving it. That is a conclusion we ought not to adopt.

Rule discharged (*a*).

(*a*) See *Regina* v. *St. Andrew's, Worcester*, 4 *Q. B.* 729.

And see stat. 8 & 9 *Vict. c.* 126. sects. 57 to 64: and stat. 9 & 10 *Vict. c.* 84. *s.* 8.

JOSEPH GILES *against* HENRY GILES.

Declaration stated that, by agreement between plaintiff and defendant, two brothers, defendant, in consideration of natural affection and for other considerations him moving, agreed to permit plaintiff to occupy lands of defendant to 29th *September*, plaintiff paying a sum named as rent on that day, as he thereby agreed to do, and then to deliver up the premises to defendant; and, upon plaintiff so quitting the premises, paying the rent, and releasing defendant from all claims under their father's will, and quitting claim to all lands which were of the father, which plaintiff agreed to do, defendant would pay plaintiff 200*l.*, with interest from 29th *September*: and it was agreed that all deeds and releases to be required by defendant should be prepared by his attorney at his expense. Averment of mutual promises; and that plaintiff, on 29th *September*, was ready and willing to deliver up the premises to defendant, and to pay the rent, and was at all times, from the making of the agreement, ready and willing to release &c. That, although 29th *September* and a reasonable time thence for the payment of the 200*l.* had elapsed, and no release was prepared by defendant's attorney, defendant had not paid the 200*l.*, with interest. Plea: that plaintiff was not ready and willing to quit and deliver up, and to pay the rent. On special demurrer:

Held: that the performance of plaintiff's promises and that of defendant's undertaking to pay were conditions concurrent; and therefore the averment, in the declaration, of readiness and willingness was sufficient without averment of actual performance, but that such averment of readiness &c. was material; and, consequently, the traverse in the plea answered the declaration. And that the plea was not double, because plaintiff was bound to be ready &c. both to pay and to deliver possession, and the plea cast on the defendant no more proof than was necessary to maintain the declaration.

Another plea traversed the plaintiff's readiness and willingness to release. On special demurrer:

Held bad, because it was averred in the declaration that no release was prepared by defendant's attorney as provided in the agreement, and therefore plaintiff's readiness to execute it, if prepared, was immaterial.

ASSUMPSIT. The declaration stated that heretofore, to wit 21st *September*, 1840, by an agreement then made, by defendant of the first part, plaintiff of the second part, and *John Giles* of the third part, reciting that *Henry Giles* the elder (deceased), father of defendant and plaintiff and of *Ann Giles* wife of the said *John Giles*, made his will, dated 3d *June*, 1839, whereby, after giving an annuity of 30*l.* to plaintiff, and to other parties two other annuities and a legacy, he devised to defendant all his freehold lands in *Porthmeor*, and all his leasehold lands in *Rosemergee* and *Bojewyan*, habendum, the freehold lands to defendant in fee, and the leasehold lands to defendant, his executors, &c., for all such term &c. as might be to come at the time of testator's death, subject, as to the freehold lands, to the

annuities and legacy, and appointed defendant sole executor and residuary legatee and devisee; reciting also that, by indenture dated 22nd *March* 1841, between the said *H. Giles* the elder of the first part, defendant of the second part, and *Charles Paynter* of the third part, *H. Giles* the elder demised to *Paynter*, his executors, &c., for two thousand years, the aforesaid lands in *Porthmeor*, and assigned to him, his executors, &c., the said leasehold lands in *Rosemergee* and *Bojewyan*, for the residue of the terms therein, in trust to pay to *H. Giles* the elder an annuity, and, subject thereto, upon trust for defendant, his executors, &c.; and reciting further that, by the revocation of the will by the indenture as touching the annuities and legacies charged on the lands, the annuitants and legatee were left wholly unprovided for: defendant, as well in consideration of the natural love and affection which he had and bore for and towards his brother the plaintiff, the other annuitants, and the legatee, and also for divers other good causes and considerations him thereunto moving, did, among other things, thereby agree to permit and suffer plaintiff to occupy all that part of the said lands and premises in *Porthmeor* aforesaid then in his possession, until 29th *September* 1843, he, plaintiff, paying therefore, on the last mentioned day, to defendant, as he thereby agreed to do, the sum of 30*l.* as rent for the same, and then to deliver up the same premises to the defendant, his heirs and assigns, in good tenantable repair, and in the meantime to manage, &c., the premises in a good husbandlike manner, &c., and also to permit defendant, his heirs or assigns, to enter, &c. (for certain agricultural purposes); "and, upon the plaintiff, his heirs,

executors and administrators, so quitting the said premises, paying the said rent, and observing the other stipulations before mentioned, and releasing the defendant, his heirs and assigns, from all claims of and under the said will, as also releasing and quitting claim to the defendant, his heirs, executors, administrators and assigns, all the freehold and leasehold lands and hereditaments which were of the said testator devised or bequeathed, given, granted or demised, conveyed, or assigned, by or under any former will or settlement of the said *Henry Giles*, deceased, and which the plaintiff did thereby, for himself, his heirs, executors and administrators, agree to do, he, the defendant, his heirs, executors, administrators or assigns, should and would well and truly pay unto the plaintiff the sum of 200*l.* with interest," at 4*l.* 10*s.* per cent., to be calculated from 29th *September* then instant: "And it was by the said agreement further agreed, between the parties thereto, that all deeds or releases to be required by the defendant from any or either of the other parties in pursuance of those presents should be prepared by the attorney of the defendant, his heirs, executors, administrators or assigns, at his or their own expense." (The declaration then set out other stipulations on the part of defendant, not material to the decision of the Court.) And, the agreement having been so made, afterwards, to wit on &c., in consideration thereof, and that plaintiff at the request of defendant had then promised &c.; averring mutual promises of performance. And plaintiff saith that he hath always, from the making &c., in all things on his part performed and fulfilled the same: and that afterwards, to wit on the said 29th *September* 1843, "he, the plain-

tiff, was ready and willing to quit and deliver up the said premises to the defendant, and to pay the said rent; and the plaintiff farther saith that, at all times from the making of the said agreement, he, the plaintiff, was ready and willing to release the defendant, his heirs and assigns, from all claim of and under the said will in the said agreement mentioned; and also to release and quit claim to the defendant, his heirs, executors, administrators and assigns, all the freehold and leasehold lands and hereditaments, which were by the testator aforesaid devised or bequeathed, given, granted or demised, conveyed or assigned, by or under any former will or settlement of the said *Henry Giles*, deceased, aforesaid, and to complete and fulfil the said agreement: And, although the said 29th *September*, 1843, did elapse a long time before the commencement of this suit, and although a reasonable time did elapse between the said last mentioned day and the commencement of this suit, for the payment of the said sum of 200*l.* and interest as aforesaid, according to the said agreement: of all which" &c. (notice to defendant): "and the plaintiff further says that, although no release was prepared by the attorney of the defendant, on or before the said last mentioned day, under and according to the said agreement: Yet the defendant, not regarding the said agreement, nor his said promise, hath not as yet paid the said sum of 200*l.* with the interest" &c., although often requested.

Plea 2. That plaintiff was not ready and willing to quit and deliver up the said premises, so in the possession of plaintiff, as in the said agreement mentioned, and to pay the said rent, in manner and form, &c.: conclusion to the country.

Demurrer, assigning for causes that the plea is a traverse of an immaterial averment in the declaration, and tends to raise an immaterial issue: and that the delivery of possession of the premises mentioned in the agreement was an independent undertaking, and not a condition precedent to, or concurrent with, the payment of the money, in respect of the nonpayment of which the action is brought. That the payment of the rent by plaintiff is not a condition precedent to or concurrent with the payment of the said money. That, by the traverse, two matters quite distinct in themselves are mixed up together, namely, the nondelivery of possession of the premises, and the nonpayment of the rent; whereas the denial of readiness and willingness ought to have been pleaded separately to each. That the plea is double.

Joinder in demurrer.

Plea 3. That plaintiff was not ready and willing to release the defendant, his heirs, &c., from all claim of and under the will in the agreement mentioned, and also to release and quit claim to defendant, his heirs, &c., all the freehold and leasehold lands &c. (as in the declaration), and to complete the said agreement, in manner and form &c.: conclusion to the country.

Demurrer, assigning for cause that the plea is a traverse of an immaterial averment in the declaration, and tends to raise an immaterial issue: that the undertaking to release the defendant, his heirs and assigns, as in the agreement set forth, was a distinct and independent undertaking, and was not a condition precedent to, or concurrent with, the payment by defendant to plaintiff of the money. That it was defendant's duty to prepare and tender such release: and that this obligation

on his part would not be waived or discharged by the mere fact that plaintiff was not ready or willing to execute it: and that, consequently, the averment of the plaintiff's readiness and willingness (taken per se) is wholly immaterial to the result of the action.

Joinder in demurrer.

The demurrer was argued in last *Easter* term (*a*).

Butt, for the plaintiff. The pleas tender immaterial issues. The allegations which the pleas traverse were unnecessary, because they relate, not to conditions precedent, but to independent stipulations. The authorities are collected in note (4) to *Pordage* v. *Cole* (*b*). It is there laid down (rule 3) that, "where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration;" and *Boone* v. *Eyre* (*c*) is cited. There the defendant's covenant was, that, "the plaintiff well and truly performing all and every thing therein contained on his part to be performed," the defendant would pay an annuity. The plaintiff, by the same deed, transferred an equity of redemption in an estate, with the negroes on it, in consideration of 500*l.* and the annuity; and covenanted that he had title: and, on covenant for non-payment of the annuity, it was held no plea to traverse the title. So, here, there are several

(*a*) *May* 1, 1846. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Wightman* Js.

(*b*) 1 *Wms. Saund.* 320 *a.* 6th ed.

(*c*) In *K. B.*, note (*a*) to *Duke of St. Albans* v. *Shore*, 1 *H. Bl.* 273; and see, as to *S. C.*, 6 *T. R.* 573 (in *Campbell* v. *Jones*): Also *Boone* v. *Eyre*, in *C. P.*, 2 *W. Bl.* 1312.

distinct stipulations on the part of the plaintiff; and an action might have been maintained for the breach of any one, even before the time arrived for payment of the money by the defendant. Thus, the plaintiff is to pay 30*l.* for rent: he is also to manage the land in a husbandlike manner. The damages might be assessed independently for any one breach by the plaintiff. *Ritchie* v. *Atkinson* (*a*), *Campbell* v. *Jones* (*b*), *Carpenter* v. *Cresswell* (*c*) and *Dawson* v. *Dyer* (*d*) are instances of applications of the same rule. In the 6th edition of *Saunders's Reports* the following remark is appended to the note already cited (*e*). "Where the consideration for the payment of money is entire and indivisible, as where the benefit expected by the defendant under the agreement is to result from the enjoyment of every part of the consideration jointly, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, no action is maintainable, if any part of the consideration has failed; for, being entire, by failing partially, it fails altogether." For this *Chanter* v. *Leese* (*g*) is cited, where the consideration was manifestly entire. *Stavers* v. *Curling* (*h*) is an instance in which the covenants were held to be independent, the plaintiff's covenants, insisted on by the defendants, going only to a part of the consideration; and *Ritchie* v. *Atkinson* (*a*) was relied on.

Montague Smith, contrà. The stipulations on the part of the plaintiff are either conditions precedent or condi-

(*a*) 10 *East*, 295.
(*b*) 6 *T. R.* 570.
(*c*) 4 *Bing.* 409.
(*d*) 5 *B. & Ad.* 584.
(*e*) 1 *Wms. Saund.* 320 *d*, note (*c*).
(*g*) 4 *M. & W.* 295. Affirmed, on error, in *Exch. Ch.*; *Chanter* v. *Leese*, 5 *M. & W.* 698.
(*h*) 3 *New Ca.* 355.

tions concurrent. In the former case, the declaration is bad for not averring that the plaintiff had performed the conditions: an averment of readiness and willingness is insufficient. In the latter case the averment is indeed sufficient; but it is still material: and, therefore, the traverses in the two pleas answer the complaint. The plaintiff can succeed only on the assumption that the stipulations on his part and the contract of the defendant are independent of each other. The criterion suggested on the other side is correct: but, when applied to this agreement, it is in favour of the defendant. The agreement is, first, that the plaintiff shall occupy the land, paying rent, delivering up in good repair, and cultivating properly; secondly, that the defendant will pay money to the plaintiff, on his quitting, paying the rent, observing the stipulations, and releasing the claims on the defendant. The liability of the defendant is, in express terms, made dependent upon the performance on the part of the plaintiff. And that performance is the only consideration for the payment by the defendant, which otherwise is gratuitous. The case does not resemble those where the stipulations are held to be independent because the consideration is the covenanting to do something, not the doing it; such as *Rose* v. *Poulton* (*a*), where this distinction is particularly insisted upon by *Taunton* J. Nor, again, are cases like *Carpenter* v. *Cresswell* (*b*) applicable, where the consideration is abstinence for an indefinite time. In 1 *Chitt. Pl.* 331 (7th ed.) it is said: "In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing

(*a*) 2 *B. & Ad.* 822. 831. (*b*) 4 *Bing.* 409.

of the act is a condition precedent to the payment." *Glazebrooke* v. *Woodrow* (*a*) is a strong authority for the defendant. No time for the payment by the defendant is here pointed out in the agreement, except the performance of the stipulations by the plaintiff. Even if the times were to be coincident, readiness should be shewn, as in *Jones* v. *Barkley* (*b*). If that averment were struck out, no breach could appear. [*Patteson* J. If the defendant had sued the plaintiff for non-performance, must the declaration have averred readiness to pay?] It should seem not: but, supposing that it must, the conditions are concurrent, and the pleas here answer the declaration. According to *Goodisson* v. *Nunn* (*c*) and *Chanter* v. *Leese* (*d*), the performance by the plaintiff here was a condition precedent.

Butt, in reply. The argument, that no time for the payment is fixed by the agreement, fails; for in all such agreements a reasonable time will be intended. [*Wightman* J. At what time were you bound to release?] Whenever required. The right to insist upon each of the plaintiff's stipulations separately formed the whole consideration; and, as in *Hall* v. *Bainbridge* (*e*), the result is that the conditions were independent. The words "upon the plaintiff" "so quitting" &c. are insisted upon: but they are not stronger than the words in *Boone* v. *Eyre* (*g*).

Cur. adv. vult.

(*a*) 8 *T. R.* 366. (*b*) 2 *Doug.* 684.

(*c*) 4 *T. R.* 761.

(*d*) 4 *M. & W.* 295. Affirmed, on error, in Exchequer Chamber. *Chanter* v. *Leese*, 5 *M. & W.* 698.

(*e*) 5 *Q. B.* 233.

(*g*) Note (*a*) to *Duke of St. Albans* v. *Shore*, 1 *H. Bl.* 273. *Boone* v. *Eyre*, 2 *W. Bl.* 1312.

PATTESON J., in this term (*May* 29th), delivered the judgment of the Court.

The first question in this case is, whether the declaration be sufficient. It is objected to on the ground that the plaintiff has only averred his readiness and willingness to deliver up the premises, to pay the rent, and to release the defendant; whereas the defendant contends that those things were conditions precedent to his paying the 200*l.* under the agreement, and, therefore, that the plaintiff ought to have averred the actual performance of those things. The plaintiff, on the other hand, contends that those things to be done by him, and the payment of the 200*l.* by the defendant, were independent acts altogether; and that his averment of readiness and willingness to do them was unnecessary and not traversable; and that the defendant, in traversing them, has tendered immaterial issues.

We think that the plaintiff is clearly wrong in his view, and that these acts of each party are clearly not independent. The words are, "upon" the plaintiff doing so and so, the defendant promises to pay 200*l.* The time for paying that 200*l.* is not fixed by the agreement itself, and cannot be fixed otherwise than by the plaintiff doing the acts required on his part. The cases collected in note (4) to *Pordage* v. *Cole* (*a*) were cited on the argument, and are important: but there are also others cited in note (3) to *Peeters* v. *Opie* (*b*), which are quite as important, and more strictly applicable to the present case. Upon consideration of those cases, and of the intention of the parties to the agreement in this case, as shewn by the agreement itself, we are of opinion

(*a*) 1 *Wms. Saund.* 320 *a.* 6th ed. (*b*) 2 *Wms. Saund.* 352.

that the acts to be done by the plaintiff were not condition precedent, not independent, but concurrent with those to be done by the defendant; and, therefore, that it was sufficient for the plaintiff to aver readiness and willingness to do them.

But it was also necessary for him to make that averment. It follows that the averment was traversable; and therefore the plaintiff's demurrer to the pleas, on the ground that they tender immaterial issues, cannot be sustained, except indeed as to the third plea from other reasons.

But the plaintiff objects to the pleas on other grounds.

To the second, that it is multifarious, inasmuch as it puts in issue two distinct things, the plaintiff's readiness and willingness to pay the rent, and also to deliver up possession (*a*). Now the plaintiff was bound to do both acts. The issue therefore has not cast upon him too great burthen of proof; and, although his non-readiness to do either would have been an answer to the action, yet it does not necessarily follow that the defendant was bound to traverse them separately. The principle laid down in *Stubbs* v. *Lainson* (*b*), *Drewe* v. *Lainson* (*c*) and *Moore* v. *Boulcott* (*d*) is that a traverse is too large where it casts more proof on the other side than is necessary to maintain the pleading which contains the allegation traversed. That is not so here: and therefore we think the second plea is not objectionable on that ground.

(*a*) This ground, though specially assigned for demurrer, was not noticed in the argument.

(*b*) 1 *M. & W.* 728; *S. C. Tyr. & G.* 1000.

(*c*) 11 *A. & E.* 529.

(*d*) 1 *New Ca.* 323.

Judgment must therefore be given for the defendant on that plea.

To the third plea the plaintiff objects (*a*) that, as it appears by the agreement set out in the declaration that the release to be given to the defendant was to be prepared by the defendant's attorney, and as it is averred in the declaration that no such release was prepared, the plaintiff's readiness and willingness to have executed the release, if prepared, becomes immaterial. And we think that this objection must prevail. If no release was prepared by the defendant's attorney, the plaintiff might sue the defendant for the money, whether he was ready to have executed it or not. Indeed, if none were prepared, it would be difficult for the plaintiff to prove his readiness to have executed; for he was not bound to call upon the defendant to prepare a release, or to offer to execute one. If, on the other hand, a release was prepared by the defendant, he should have pleaded that fact, and shewn a refusal by the plaintiff to execute.

Upon the demurrer to this plea, therefore, we think the issue is immaterial, and that the judgment must be for the plaintiff.

Judgment for defendant on demurrer to the second plea; for plaintiff on the demurrer to the third.

(*a*) See the grounds specially assigned for demurrer, antè, pp. 168, 169.

[*Thursday*, 21st *November*, 1844.]

Remington and Simpson *against* Dolby (*a*).

Where a prohibition is applied for, the Court will always, on the demand of the party against whom the application is made, put the party applying to declare in prohibition.

Sir *W. W. Follett*, Solicitor General, in last *Hilary* term, obtained a rule nisi to prohibit the Episcopal Consistorial Court of *Lincoln* from proceeding in a suit there, by *Remington* and *Simpson*, churchwardens of *Long Bennington*, against *Dolby*.

From the affidavits in support of the rule it appeared that *Thomas Dolby* was cited before the Consistorial Court of *Lincoln*, in *June* 1843, to answer *Daniel Remington* and *George Simpson*, churchwardens of the parish of *Long Bennington*, in a cause of subtraction of church rate; and in *August* a libel was exhibited against him, setting out that a rate was made according to custom, and that he was chapelwarden of *Foston*, a hamlet, township or chapelry within the parish, had been required to levy the customary share payable by *Foston*, and had refused or delayed to do so. The answer (among other things) denied the custom. Additional articles of libel were given in, and an answer thereto.

The affidavits further set forth that a rule nisi for a mandamus, commanding *Dolby* to make and assess a rate for levying the customary share of this very rate, had been obtained, and afterwards discharged by this Court (*b*).

(*a*) The publication of this case has been delayed, in order that it might accompany *Dolby* v. *Remington*, p. 179, *post*.

(*b*) See *Regina* v. *Dalby* (*Dolby*), 3 Q. B. 602.

Kelly and *Pearson* now shewed cause, and admitted that they could not support the rate, at this stage, if the facts brought it within the decision in *Regina* v. *Dalby* (*a*). But they contended that the party opposing the rule was entitled to insist upon the opposite party declaring in prohibition, in order that the question might be placed on the record.

Martin and *Unthank*, contrà. In a very late case, *In the matter of the Dean of York* (*b*), the Court were strongly urged, by the parties against whom a prohibition was prayed, to put the opposite party to declare; but, after time taken for consideration, they stated that, as they felt no doubt, they could encourage none, and made the rule absolute. The same course was pursued in a previous case, *In the matter of the Chancellor &c. of Oxford, and Taylor* (*c*). Here no doubt can exist, since *Regina* v. *Dalby* (*a*). Besides, the Ecclesiastical Court can have no jurisdiction, as the rate is founded upon a custom; *Com. Dig. Prohibition* (F 14.). The proceedings in the Ecclesiastical Court shew a direct denial of the custom, so that there is no such objection to the prohibition as that which prevailed in *The Earl of Beauchamp* v. *Turner* (*d*); and the rule in *Dunn* v. *Coates* (*e*) applies. [Lord *Denman* C. J. In *Com. Dig. Prohibition* (I) it is said: "Leave to declare in prohibition will be granted only when the Court inclines to prohibit, not when it inclines to the contrary;" for which *Rex* v. *The Bishop of Ely* (*g*) and *Lindo* v. *Rodney* (*h*) are cited: and it is

(*a*) 3 *Q. B.* 602.
(*b*) 2 *Q. B.* 1.
(*c*) 1 *Q. B.* 952. 974 note (*a*).
(*d*) 10 *A. & E.* 218.
(*e*) 1 *Atk.* 288. 289.
(*g*) 1 *W. Bl.* 71. 81.
(*h*) Note [1] to *Le Caux* v. *Eden*, 2 *Doug.* 613. 619, 620.

added: "The party applying for a prohibition, has no right to insist on declaring, when the Court is satisfied that his application is groundless; but the defendant in prohibition may, when the opinion of the Court is against him;" for which *St. John's College* v. *Todington* (*a*) is cited.] Those passages were insisted upon in the case *In the matter of the Dean of York* (*b*); but the Court decided the other way, on full deliberation.

Lord DENMAN C. J. It does not appear that the Court was there particularly called on to consider the authorities with this view. We must have assumed that parties having no rights would not desire to go on with a case at the risk of costs.

WILLIAMS J. concurred.

COLERIDGE J. I am by no means sure that we can prevent the party opposing a prohibition from insisting on a declaration.

WIGHTMAN J. concurred.

Ordered, that *Dolby* declare in prohibition (*c*).

(*a*) 1 *Bur.* 158. 198.

(*b*) 2 *Q. B.* 19. Sir *J. Campbell*, Attorney General, cited *Com. Dig Prohibition* (I.), but without going farther into authorities.

(*c*) See the next case.

DOLBY *against* REMINGTON, SIMPSON, and HAGGARD, LL.D.

Declaration in prohibition recited that *F.* was a parish, in which was an immemorial parish

DECLARATION in prohibition (*a*). The count stated that, whereas, by the laws of this realm, the trial of what are the bounds and limits of parishes church, and that the inhabitants, from time immemorial, repaired the church, &c., there by rates on lands, &c., within *F.*: that *D.* (the plaintiff) was churchwarden of *F.*: that *R.* (defendant), being churchwarden of parish *L.*, cited *D.* in the Spiritual Court, in a cause of subtraction of church-rate, and, in the libel, alleged: (1) That *F.* was a hamlet in parish *L.*; (2) That there was a custom by which the inhabitants of *F.* supported their own church (called chapel in the libel), and contributed to the support and reparation of the parish church of *L.*, *and all expenses and charges necessarily laid out by the churchwardens of L.*, in the proportion of three eighths; (3) That the parish church of *L.* needed repairs, and the rate-payers of *L.* made a rate towards them, of which three eighths ought to have been paid by the inhabitants of *F.* according to the custom. The count then stated that *D.* gave in a negative issue to the libel, denying its allegations. That afterwards, and after the libel had been admitted to proof, *D.*, by personal answers, pleaded: (1) That *F.* was not part of parish *L.*; (2) Admitting that the inhabitants of *F.* supported their own church, but denying that there was a custom by which they contributed to the support and reparation of the parish church of *L.*, *and all or any of the expenses and charges necessarily laid out and expended by the churchwardens of L.*, in the proportion of three eighths; (3) Admitting the need of repairs, and the rate, but denying that three eighths ought to be paid by the inhabitants of *F.* according to any custom. That afterwards *D.* alleged and articulately propounded that *F.* was a distinct parish, and had a parish church, which had been immemorially repaired and maintained by the parishioners of *F.*; that *F.* was not within the parish of *L.*; that there was not a custom by which the inhabitants of *F.* contributed to the support and reparation of the parish church of *L.* (not noticing the general allegation as to *all expenses and charges* &c.) in the proportion of three eighths, and that there was no custom that the inhabitants of *F.* contributed in the proportion of three-eighths, or any other proportion, to the maintenance and reparation of the parish church of *L.* The count then stated that the suit was still pending, and defendants were proceeding therein. Wherefore plaintiff prayed a writ to prohibit the Judge of the Spiritual Court and *R.* from further holding plea in any matter touching the premises.

Held, on demurrer to a plea, a good declaration, as shewing that the parties were at issue upon two questions of fact, and which were of temporal cognizance: viz. whether *F.* was part of *L.*, and whether there was such a custom as alleged in the libel.

Plea: that there was a custom by which the inhabitants of *F.* supported their own chapel and contributed to the support and reparation of the parish church of *L.* (not noticing the general allegation as to "*all expenses and charges*" &c.) in the proportion of three eighths, in manner and form as in the libel alleged.

Held bad, on demurrer, as not asserting the custom alleged in the libel, and as not noticing the other issue in fact respecting the parochiality of *F.*

(*a*) See the preceding case.

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DOLBY v. REMINGTON.

within this realm, and how far the same do extend, and also the trial of all pleas of or concerning customs or prescriptions, now belong, and, from time whereof &c., have belonged, and of right &c., to the Courts of Common Law of this realm, and to the Queen's Temporal Judges only, and not to any Spiritual Court, or to any of the Queen's Spiritual Judges: And whereas, long before and at the time of the making of the church rate after mentioned, and from thence continually hitherto, there has been, and still is, within the county and diocese of *Lincoln*, a certain parish called or known by the name of *Foston*, next adjoining a certain other parish in the same county and diocese called or known by the name of *Long Bennington*, in which said parish of *Foston*, during all the period aforesaid, there was and is a parish church, at which the inhabitants of the said parish, during all that period, and from time whereof &c., have received and enjoyed all manner of divine rites and services therein; and the costs and expenses of repairing the said church, and of providing necessaries for the performance of divine rites and services therein, are, and from time whereof &c. have been, defrayed by rates and assessments upon the possessors and occupiers of lands, houses and tenements situated within the said parish, and not elsewhere: and whereas also, at and after the time of the making of the said church rate, and also at the time of the citation to appear in the Episcopal and Consistorial Court of *Lincoln*, as hereinafter mentioned, the plaintiff was churchwarden of the parish of *Foston*, and the defendants *Daniel Remington* and *George Simpson* were churchwardens of the parish of *Long Bennington*: Yet the defendants, knowing the premises, but contriving to aggrieve

plaintiff, contrary to the course of the law of this realm, and to draw cognizance of a plea which specially belongs to the said Temporal Courts to another examination in the said Spiritual Court, and pretending that the said parish of *Foston* was and is a part of, and within the bounds of, the said parish of *Long Bennington*, and also that a certain custom existed and exists for the inhabitants of the parish of *Foston* to contribute in a certain proportion to the support and reparation of the parish church of *Long Bennington*, heretofore, to wit 23d *June* 1843, wrongfully and deceitfully caused the plaintiff to be cited to be and appear in the Episcopal and Consistorial Court of *Lincoln* aforesaid, to answer the defendants *Remington* and *Simpson* in a cause of subtraction of a rateable proportion of a church rate or assessment: and thereupon afterwards, and after plaintiff had been compelled to appear, and had appeared, in the said Episcopal &c., in pursuance of and in obedience to the said citation, and before the commencement of this suit, to wit 31st *August* in the year aforesaid, defendants *Remington* and *Simpson* wrongfully and deceitfully impleaded and libelled plaintiff in the said Episcopal &c., before the defendant *John Haggard*, Doctor of laws, Vicar General in spirituals of the Right Reverend &c. (the Bishop of *Lincoln*), Official principal of the said Episcopal &c.: and did, by the said libel, amongst other things allege:

First, that for twenty, thirty, forty, fifty and sixty years then last past, and for time whereof the memory of man &c., the parish of *Foston*, in the said libel called the hamlet, township or chapelry of *Foston*, in the county of *Lincoln*, had been esteemed, deemed and taken to be, and actually was, a part of and within the parish

of *Long Bennington*, in the said county and diocese; and for and as such was commonly esteemed, accounted, reputed and taken to be: And, secondly, defendants *Remington* and *Simpson* did, by the said libel, allege that for ten, twenty, &c. years then last past, and for time whereof &c., an ancient laudable usage, custom and prescription had been observed and prevailed, by which the inhabitants of *Foston* had supported and maintained their own church, in the said libel called chapel, and also contributed to the support and reparation of the parish church of *Long Bennington*, *and all expenses and charges necessarily laid out and expended by the churchwardens or churchwarden of* Long Bennington, in the proportion of three parts in eight of all such expenses and charges; and that, when the churchwardens or churchwarden of *Long Bennington* levied the sum of 8*l.* for the repair of their parish church, or in the due execution of their office of churchwardens, the inhabitants of *Foston* aforesaid had, for all the time aforesaid, been used and accustomed to raise amongst themselves the sum of 3*l.*, and so in proportion to a greater or less sum, and, by persons in the said libel called their chapelwarden or chapelwardens, to pay the same to the churchwardens or churchwarden of *Long Bennington*, for and towards and as their just and due proportion of such charges and expenses levied on the parishioners of the said parish: And, thirdly, defendants *Remington* and *Simpson* did, by the said libel, allege that in A. D. 1841 they were churchwardens of *Long Bennington*, and were duly admitted &c.: and, the parish church standing in need of certain repairs, and the collection of certain moneys having become requisite to meet and discharge the same, as well as other

incidental charges belonging to the office of the churchwardens of the said parish, the said churchwardens did convene a meeting of the rate-payers of the said parish in the vestry of the parish church of *Long Bennington*, on or about the 14th *October* 1841, pursuant to due notice: and that the said rate-payers, thus assembled, did then and there proceed to make a rate or assessment for and towards the repairs of the said parish church, and likewise for the aforesaid other incidental charges belonging to the office of churchwardens, amounting in the whole to the sum of 16*l.*, three eighth parts of which, amounting to the sum of 6*l.*, ought to have been paid and borne by the inhabitants of *Foston*, according to the ancient usage and custom aforesaid.

That such proceedings were thereupon had in the said Court that afterwards, to wit 5th *October* 1843, the now plaintiff gave, in the said Episcopal &c., a negative issue to the said libel, thereby denying the allegations of the said libel.

And that afterwards, and after the said libel had been admitted to proof, after the plaintiff had put in and given the said negative issue to the said libel, and before the commencement of this suit, to wit on 26th *October* in the year aforesaid, plaintiff, by way of answer to the said libel, did, by his personal answers in the said Court, before the defendant *John Haggard*, then being such Vicar General &c., plead and allege, amongst other things: 1st. To the aforesaid first position or article of the libel the now plaintiff, answering, said that he denied that for ten, twenty, &c. years then last past, and from time whereof &c., the hamlet, township or chapelry, so called in the said libel, of *Foston*

had been esteemed, deemed and taken to be, or that the same actually was, a part of, or within, the parish of *Long Bennington*, or that it was so commonly accounted and taken to be: 2dly. To the aforesaid second position or article of the libel the now plaintiff, answering, said that he admitted and confessed that, for ten, twenty, &c. years then last past, and for time whereof &c., the inhabitants of *Foston* had supported and maintained their own church (in the libel called chapel) of *Foston*; but he utterly disbelieved, and wholly denied, that, for such or any other time, any ancient laudable (or other) usage, custom or prescription had been observed or had prevailed, by which the inhabitants of *Foston* had contributed to the support and reparation of the parish church of *Long Bennington*, and all or any of the expenses and charges necessarily or otherwise laid out and expended by the churchwardens of *Long Bennington*, in the proportion of three parts in eight of all such expenses and charges; and the now plaintiff denied that, when the churchwardens or churchwarden of *Long Bennington* had levied the sum of 8*l.* for the repairs of their parish church or otherwise, the inhabitants of *Foston* had, for the time aforesaid, been used and accustomed to raise amongst themselves the sum of 3*l.*, and so in proportion to a greater or less sum, and to pay the same to the churchwardens or churchwarden of *Long Bennington* as their proportion of such charges: 3dly. To the aforesaid third position or article of the libel the now plaintiff, answering, said that he admitted that *Remington* and *Simpson* were churchwardens of *Long Bennington*, and were duly admitted &c.; and that, the parish church of *Long Bennington* standing in need of certain repairs,

and the collection of certain moneys having become requisite to meet the same, as well as other incidental charges belonging to the office of churchwarden, they the said *Remington* and *Simpson* did convene a meeting &c. (admitting the making of the rate as alleged in the libel); but that the now plaintiff denied that three eighth parts thereof, amounting to the sum of 6*l.*, ought to have been paid and borne by the inhabitants of *Foston* aforesaid, according to any ancient usage or custom.

And such further proceedings were thereupon had in the said Court that afterwards, and before the commencement of this suit, to wit 7th *December* 1843, plaintiff did, in the said suit, and in the said Court, before the defendant *John Haggard*, then being such Vicar General &c., allege and articulately propound: That *Foston* was a distinct and separate parish, and had a parish church, which had been, time out of mind, maintained and repaired by the parishioners of the said parish of *Foston*, and that the same was not a hamlet, chapelry or township belonging to or within the parish of *Long Bennington*, as falsely and untruly alleged in the said libel admitted in that cause; that, from time whereof &c., *Foston* had been held and considered a separate or distinct parish to and for all intents and purposes; that it was falsely and untruly alleged, in the libel given in and admitted in that cause on the part and behalf of *Remington* and *Simpson*, that for twenty, thirty, &c. years last past, and from time whereof &c., an ancient laudable usage, custom and prescription had been observed and had prevailed by which the inhabitants of *Foston* had contributed to the support and reparation of the parish church of *Long Ben-*

nington in the proportion of three parts in eight of all the expenses and charges of such support and reparation, and that, when the churchwardens of *Long Bennington* aforesaid levied the sum of 8*l.* for the repairs of their parish church, or in the due execution of their office as churchwardens, the inhabitants of *Foston* had, for all the time aforesaid, been used and accustomed to raise amongst themselves the sum of 3*l.* and so in proportion to a greater or less sum, and to pay the same to the churchwardens or churchwarden of *Long Bennington*, for and towards and as their just and due proportion of such charges and expenses; for that the truth and fact was, and the now plaintiff expressly alleged and propounded, that there was no such ancient laudable or other usage, custom or prescription, to wit of the inhabitants of *Foston* aforesaid contributing in the proportion of three parts in eight, or in fact in any other proportion, towards the maintenance and reparation of the parish church of *Long Bennington:* that the inhabitants of *Foston* never were, nor ever had been, summoned to vestries held in and for the parish of *Long Bennington*, held either for the purpose of making church rates, or held for any other purpose.

And the plaintiff avers that the said suit in the said Episcopal &c. is still pending and undetermined, and the defendants have since proceeded, and are still proceeding, in the said suit; and this &c. (verification). Whereupon plaintiff humbly implores the aid &c., and a writ of our Lady the Queen, of prohibition, to be directed to the defendants, to prohibit them and every of them that neither they nor any of them do further hold plea in the said Spiritual Court in any matter touching the premises: and plaintiff also prays his damages, &c.

Second plea. That, at the time of the said rate and assessment in the libel mentioned, and also from time whereof &c., there was, and always during the whole of that time hath been, and still is, an ancient and laudable usage, custom and prescription, which during all the time aforesaid hath been observed and hath prevailed, and still ought to be observed and to prevail, by which the inhabitants of *Foston* have supported and maintained their own chapel in the said libel mentioned, and also contributed to the support and reparation of the parish church of *Long Bennington*, in the proportion of three parts in eight of all the expenses and charges of such support and reparation: and that, when the churchwardens or churchwarden of *Long Bennington* levied the sum of 8*l.* for the repairs of their parish church, the inhabitants of *Foston* aforesaid have, for all the time aforesaid, been used and accustomed to raise amongst themselves the sum of 3*l.*, and so in proportion to a greater or less sum, and, by persons called their chapelwarden or chapelwardens, to pay the same to the churchwarden or churchwardens of *Long Bennington*, for and towards and as their just and due proportion of such charges and expenses levied on the parishioners of the said parish; in manner and form as in the said libel is in that behalf alleged. Verification.

General demurrer: and Joinder.

The demurrer was argued in this term (*a*).

Peacock, for the plaintiff. The plea does not answer the declaration. It will perhaps be said that the demurrer admits the fact pleaded, and therefore it must be

(*a*) *May* 29th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

assumed that the custom exists and is not to be disputed. But the custom set out in the plea is not the custom which the declaration shews to be in dispute in the Ecclesiastical Court: the plea omits the allegation in the libel that, according to the custom, *Foston* "contributed to" "all expenses and charges necessarily laid out and expended by the churchwardens" "of *Long Bennington*." The custom is entire: if not proved as alleged it is not proved at all. The defendant in prohibition seeks the whole rate: if there be any part to which he is not entitled, he must fail altogether; *Pense* v. *Prouse* (*a*). And the plea, besides, leaves unnoticed the allegation as to *Foston* being a part of the parish of *Long Bennington*, which is also disputed in the Ecclesiastical Court. Further, the custom, as alleged in the libel, is bad. Many expenses will fall upon the churchwardens of a parish which are of recent origin: for instance, expenses attending registration under stat. 52 *G.* 3. *c.* 146. *ss.* 2, 5. No custom could apply to these (*b*).

But an objection is made to the declaration. It will be contended that it does not appear that the facts were in issue in the Ecclesiastical Court, or that the Court is proceeding to try them. This objection was made in *Byerley* v. *Windus* (*c*), where the cause had, in the Ecclesiastical Court, not gone beyond the personal answer of the plaintiff in prohibition. But the Court said (*d*): "When once it appears by the proceedings in the Spiritual Court, that the prescription, instead of being admitted, is disputed, and that the parties are in

(*a*) 1 *Ld. Raym.* 59.

(*b*) See *Rex* v. *St. Bartholomew the Great*, 2 *B.* & *Ad.* 506.

(*c*) 5 *B.* & *C.* 1.

(*d*) 5 *B.* & *C.* 21, 23. See p. 24, note (*a*).

progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once: " and further: " According to the usage and course of proceeding in the Court Christian, neither the personal answer nor plea ever put in issue any of the facts in a libel. They are put in issue or admitted by a previous step, a negative or an affirmative issue: a negative issue denying what the libel states, an affirmative issue admitting it. A personal answer is one of the consequents upon a negative issue, and is required, at the instance of the plaintiff below, to supply him with proof of what is previously in question by the negative issue. A plea is a statement of new matter." Here a negative issue has been given in; the libel admitted to proof; and then the personal answer has been made: and then the plaintiff in prohibition has articulately propounded certain matters by way of proof. The matters disputed, namely, the custom and parochiality, are essential to the case made in the Spiritual Court by the defendants in prohibition: until they are determined, the Spiritual Court can do nothing. In *The Earl of Beauchamp* v. *Turner* (*a*) this Court refused a prohibition because the matter which the Spiritual Court could not try was not in issue; and *Patteson* J. said: "In order to raise an issue on the lease, it should be stated in a responsive allegation." Here the question is so raised.

Cowling, contrà. The declaration is bad. The allegations of the libel are independent: the second alone

(*a*) 10 *A.* & *E.* 218.

relates to the custom. It is suggested that the custom is itself bad: but that would not entitle the plaintiff here to a prohibition, because it does not yet appear that the Spiritual Court will hold the custom to be good. In *Boothly* v. *Baily* (*a*) the Court, on the ground of the prescription being bad, refused the prohibition. The prohibition is demanded for defect, not of jurisdiction, but of trial. If the fact of the custom be not in dispute, the prohibition cannot go; *Byerley* v. *Windus* (*b*). The plaintiff in prohibition relies on the negative issue, as traversing the custom in toto. It does so: but afterwards, in the personal answer, the custom is divided, a part being admitted and a part denied: and after that the plaintiff in prohibition articulately propounds a denial of the custom as it is asserted in the plea on the present record. The personal answer corresponds rather with an answer in Chancery than a plea in a common law court. The responsive allegation, counter allegation, &c., correspond to the plea, replication, &c., in our courts; 3 *Burn's Ecc. L.* 189, 190. (9th ed.), tit. *Practice*, I. 3.; *Ib.* 298., tit. *Practice*, II. 5. The question at issue will therefore appear from the latest step. Now here the pleadings in the Spiritual Court finally leave only a part of the custom in issue. There is no averment, in the declaration, that the Spiritual Court is about to proceed to trial of the fact. If this case had occurred before stat. 1 *W.* 4. *c.* 21., a contempt must have been alleged, as in 6 *Wentw.* Pl. 249—255. By sect. 1 of the statute, it is no longer necessary to aver a contempt; but the prohibition is not made grantable in any case where it was not grantable previously. Now

(*a*) *Hob.* 69 (5th ed.).

(*b*) 5 *B.* & *C.* 1. 21.

here nothing appears indicating an encroachment on the common law courts. In *Byerley* v. *Windus* (*a*), the parties were clearly proceeding to trial: there were no subsequent pleadings, as here.

But, if the declaration be good, it is answered by the plea. If the custom be found, upon trial at law, to exist in fact, a consultation will go; *Scot* v. *Wall* (*b*), *Rogers's Ecc. L.* 733, tit. *Prohibition.* The plea alleges that a part, at least, of the custom alleged in the libel does exist. If that be so found, on trial, the Spiritual Court may proceed, to that extent. The formal conclusion of a libel is: "the party proponent not obliging himself to prove all and singular the premises, nor to the burthen of a superfluous proof, against which he protests and prays, that so far as he shall prove in the premises he shall obtain in his petition, the benefit of the law being always preserved," &c.; 3 *Burn. Ecc. L.* 271, tit. *Practice*, II. 3. The prayer of the declaration is, that the Spiritual Court may be prohibited "further" to "hold plea:" whereas, if the matter in the plea be true (which the demurrer admits), the Court ought to go on to the extent of the custom stated. The prohibition, therefore, as prayed for, cannot go. [*Patteson* J. The custom alleged in the libel is entire: there is nothing to shew that the Spiritual Court will proceed as to a part only of such custom. And, if your plea be true in fact, we cannot order the Ecclesiastical Court to go on with the trial of matters which they have no power to try.] They would be directed to go on pro tanto only. In *Hallack* v. *The University of Cambridge* (*c*) this Court held that a prohibition could not

(*a*) 5 *B. & C.* 1. 22.
(*b*) *Hob.* 247 (ed. 5.).
(*c*) 1 *Q. B.* 593.

go, where the Spiritual Court was petitioned for several matters, some of which it might grant. That case, so far, overrules *Pense* v. *Prouse* (*a*).

Peacock, in reply. The libel seeks to make the parish of *Foston*, not an individual, pay a specified proportion of a certain rate, on the ground of a custom alleged in that libel. If any part of that custom be untruly alleged, the suit in the Spiritual Court fails entirely, because then no such custom exists; *Morewood* v. *Wood* (*b*), *Wilson* v. *Page* (*c*). The plaintiff in prohibition denies the custom totally, and then, in his personal answer, says that a part is untruly alleged. There is, therefore, an issue on a question which will determine the event of the suit, and which question the Spiritual Court cannot try. It is no answer to this, that a part of the custom, that is, in legal effect, a different custom, does exist. Besides, the personal answer does not narrow the question: the whole custom was previously in issue: and then the personal answer is for the purpose of shewing how the denial is to be supported; *Byerley* v. *Windus* (*d*). So the matter afterwards articulately propounded does not narrow the issue. [*Patteson* J. Is it clear that the Spiritual Court will hold, as we do, that a custom is entire?] If they hold otherwise, that is a ground for prohibition. The prohibition goes whenever the fact to be tried is one which the Ecclesiastical Courts, from their rules not being those of the common law, cannot try; *Com. Dig. Prohibition* (F 14.), citing *Foster* v. *Hide* (*e*). The

(*a*) 1 *Ld. Raym.* 59.
(*b*) 4 *T. R.* 157.
(*c*) 4 *Esp. N. P. C.* 71.
(*d*) 5 *B. & C.* 1. 23.
(*e*) 1 *Rol. R.* 332.

plea is not, except for the purposes of the demurrer, admitted to be true: the plaintiff in prohibition says that, even if it should be found that the custom exists, that does not entitle the Spiritual Court to try the question.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*June* 2d), delivered the judgment of the Court.

This is a case of prohibition: and the question is raised upon a demurrer to a plea to the declaration, which makes it necessary to advert with some particularity to the declaration and plea.

The declaration states that the plaintiff was impleaded and libelled in the Spiritual Court, and that the libel did (amongst other things) allege: 1. That the parish of *Foston*, in the county of *Lincoln*, actually was *a part of and within the parish of Long Bennington*, in the said county, during the period therein specified; 2. That, for the like period, a laudable usage had prevailed for the inhabitants of *Foston* to maintain their own church, and, also, to contribute to the repair of the parish church of *Long Bennington*, *and all expenses and charges necessarily laid out and expended by the churchwardens of Long Bennington*, in a certain proportion stated in the said libel. The declaration, after noticing other parts of the libel not material to be stated, proceeds thus: "and the now plaintiff gave, in the said Episcopal and Consistorial Court, a negative issue to the said libel, *thereby denying the allegations of the same libel.*" So that we must understand (nothing appearing to the contrary) that the first and second allegations in the said libel above set forth, and which contain matter

of purely temporal cognizance, were denied, or, as we should term it, put in issue, in the Court below. The declaration, however, proceeds further to state the course pursued in the Ecclesiastical Court, and that the now plaintiff, by way of answer to the said libel, did, by his personal answer, *plead and allege*, amongst other things: then follows a distinct denial that *Foston* is a part of or within the said parish of *Long Bennington;* and also that there is any such usage or custom as that *Foston*, besides maintaining its own church, should contribute in a certain proportion to the repair of that of *Long Bennington, and all or any of the expenses necessarily or otherwise laid out by the churchwardens of Long Bennington.* So that we see a second distinct and formal denial "*pleaded*" to the two allegations in the libel containing matter of temporal cognizance. The declaration, however, proceeds still farther, and states that such proceedings were thereupon had in the said Court, that the now plaintiff "did allege and articulately propound" that *Foston* was a distinct and separate parish, and had a parish church which had been, time out of mind, maintained by the parishioners of *Foston*, and that the same was not a hamlet, chapelry or township belonging to or within the said parish of *Long Bennington;* and that, from time whereof the memory of man is not to the contrary, *Foston* aforesaid had been held and considered a separate and distinct parish to all intents and purposes. Then follows, with respect to the said usage, a statement that it was falsely alleged in the said libel that, for the time therein mentioned, an ancient usage had been observed, by which the inhabitants of *Foston* had contributed to the support of the parish church of *Long Bennington*, in the pro-

portion of three parts in eight of all the expenses of such support, and that, when the churchwardens of *Long Bennington* levied 8*l.* for the repair of their said church, *or in due execution of their office of churchwardens*, the inhabitants of *Foston* had been used to raise 3*l.* towards and as their just and due proportion of *such* charges and expenses: and the now plaintiff expressly alleged and propounded that there was no such usage or custom of *Foston* contributing in any proportion towards the repairs of the parish church of *Long Bennington;* and that the inhabitants of *Foston* never had been summoned to vestries held for *Long Bennington*, for the purpose of making a church rate or any other purpose.

It is observable that the usage or custom for *Foston* to contribute, in the terms stated in the libel, that is, towards the repair of the church of *Long Bennington*, and also "all expenses and charges necessarily laid out and expended by the churchwardens or churchwarden of *Long Bennington*," had been twice denied by the now plaintiff; first by his "negative issue," and again in his "personal answer." But, in the latter part of the passage just quoted, the expenses of the churchwardens are omitted: and that circumstance was relied upon, in argument, in support of the plea, to which we must now advert.

It states that, from time whereof &c., there hath been and still is an ancient usage, custom and prescription, which, during all the time aforesaid, hath been observed and hath prevailed, and still ought &c., by which *Foston* has supported its own chapel, and contributed to the support and reparation of the parish church of *Long Bennington*, in a certain proportion already

specified, "as in the said libel is in that behalf alleged."

Now the usage stated in the libel, as set forth in the declaration (and there is nothing before us respecting that libel except what is so set out), is certainly not that which is stated in the plea. The part respecting the expenses of the churchwardens, which is contained in the libel, is omitted in the plea. The usage or custom, therefore, which the libel in the Ecclesiastical Court sought to enforce is another and different one from that contained in the plea. But, besides this, the plea is confined to the existence of an usage or custom by virtue of which the parishioners of *Foston* were required to contribute in the proportion of three to eight towards the parish church of *Long Bennington*, independent of and beyond the repairs of their own. It appears, however, from the statement of the proceedings contained in the declaration (and, as has been already observed, they are before us in no other manner), that another issue has been twice raised in the Ecclesiastical Court; viz. whether *Foston* be "a part of and within the parish of *Long Bennington*," a question purely of temporal cognizance, and to be tried according to the rules of the common law.

Upon the whole, we are of opinion that the plea discloses no sufficient ground for awarding a consultation, and that our judgment must be for the plaintiff.

Judgment for plaintiff.

Queen's Bench.
1846.

BARLEY *against* WALFORD.

(1891) 3. Ch. 100

Declaration in case stated that plaintiff was a printer of silk goods, and had delivered to

CASE. The declaration stated that, whereas plaintiff, before and at the time of committing &c., was, and from thence hitherto hath been, and is, a defendant a lot of such goods, in which were woven fabrics of silk, printed by plaintiff with a design for the ornamenting of them, which had been published by plaintiff to defendant and others; and plaintiff was about to print other fabrics of silk with the same design, and to publish the same in the way of his trade for gain; of all which defendant had notice: but defendant, contriving to deceive, injure and defraud plaintiff, and induce him to desist from printing more with the design, and to deprive him of the gains he would have made, *and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of defendant*, and to put plaintiff to expense, falsely, fraudulently and deceitfully represented to plaintiff that in the lot there was a copy of a registered pattern (See stats. 5 & 6 *Vict. c.* 100., 6 & 7 *Vict. c.* 65.), and that, the parties having asked defendant for the printer, defendant was obliged to give plaintiff's name; and the parties intended to proceed against plaintiff by injunction and order through the Court of Chancery (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the *statutes* respecting copyright of designs, and that the parties interested in the design had asked defendant who was the printer, and defendant had been obliged to give plaintiff's name as printer, and the parties intended to proceed against plaintiff, to prevent him from pirating the design, by injunction and order through the Court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered, according to the *statutes* aforesaid; and there were no parties interested in the design; nor had any parties asked defendant for the printer; nor had defendant given them plaintiff's name; nor did any parties intend to proceed against plaintiff by injunction &c.; as defendant, at the time of making the representation, knew: by means of which representation plaintiff, believing it to be true, was induced to travel a long distance, for the purpose of enquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances; and was induced to abstain from further printing with the design, which he had orders to do, and from selling silk handkerchiefs printed with the design; and defendant, by means of the premises, enjoyed the benefit of the design to the exclusion of plaintiff, and printed with the design, and sold, for his profit, silk handkerchiefs, and took the profits, without the competition of plaintiff, and to his exclusion.

On general demurrer:

Held, that the declaration shewed a cause of action, it appearing that defendant had knowingly uttered a falsehood with the design to deprive plaintiff of a benefit and acquire it to himself, and the damage naturally flowing from plaintiff's belief.

And that the innuendo was unnecessary, and could not therefore be the ground of an objection to the declaration.

The following objections were also disallowed:

That the very words of the representation were not set out;

That the declaration, without the innuendo, did not shew a representation by defendant that the copyright of the supposed parties still existed;

That the truth of the representation was not properly negatived, the averment in that respect mentioning *statutes* in the plural, instead of being confined to stat. 5 & 6 *Vict. c.* 100.

printer of silk goods, and hath, during all that time, used, exercised and carried on the trade and business of a printer of silk goods; and plaintiff, before the committing &c., had sent and delivered to defendant divers lots of printed goods; and, in the last lot of such goods which plaintiff had so sent &c. before the committing &c., there were divers woven fabrics of silk, to wit silk handkerchiefs, which had been printed by plaintiff, in the way of his said trade &c., with a certain pattern or design for the ornamenting of the said silk handkerchiefs, and had been published by plaintiff to defendant and other persons before the committing &c., and plaintiff, before and at the time of the committing &c., was also about to print other woven fabrics of silk, to wit other silk handkerchiefs, in the way of his said trade &c., with the same pattern or design for the ornamenting of the last mentioned silk handkerchiefs, and to publish the same, when so printed, in the way of plaintiff's said trade &c., for gain and reward to plaintiff in that behalf: of all which premises defendant, before and at the time of the committing &c., had notice: Nevertheless defendant, well knowing the premises, but contriving &c. to deceive, injure and defraud plaintiff in this behalf, and to induce him to desist from printing or ornamenting any more handkerchiefs with the said design or pattern, and to deprive him of all the gains &c. which he might and would have made and derived therefrom, and to cheat plaintiff out of the benefit, profit and advantage of the said design or pattern, and to acquire the same for the sole use and benefit of him, defendant, and to put plaintiff to great and unnecessary expense and trouble, and to vex, harass and injure

plaintiff, heretofore, and after 1st *September* 1843 (*a*), to wit on 21st *April* 1844, falsely, fraudulently and deceitfully represented and affirmed to plaintiff, of and concerning the said last lot of goods so sent and delivered to defendant, and of and concerning the said silk handkerchiefs contained therein, and which plaintiff had printed and ornamented and published with such design or pattern, That in the said last lot of goods there was a copy of a registered pattern, and that, the parties having asked defendant for the printer, he, defendant, was obliged to give plaintiff's name; and that the said parties intended to proceed against plaintiff in the most expensive way, by injunction and order through the Court of Chancery (thereby then meaning that the said pattern or design with which the said silk handkerchiefs, so contained in the said last lot of goods, were printed and ornamented as aforesaid, was a copy of a pattern or design which had been and was registered, and the copyright in which was then subsisting, according to the *statutes* then and still in force relating to the copyright of designs; and that the parties interested in the said pattern or design had asked defendant who was the printer of the said silk handkerchiefs, and that defendant had been obliged to give and had given them plaintiff's name as the printer of the said silk handkerchiefs; and that such parties interested intended to proceed against plaintiff, to prevent him from pirating the said design, by injunction and order through the Court of Chancery): Whereas, in truth and in fact, no such pattern or design as aforesaid, nor any pattern or design resembling the said pattern or design

(*a*) Stat. 5 & 6 *Vict. c.* 100. came into operation on 6th *September* 1842 (sect. 1); Stat. 6 & 7 *Vict. c.* 65. on 1st *September* 1843 (sect. 1).

printed on the said silk handkerchiefs by plaintiff, had been or was registered according to the *statutes* aforesaid, as defendant, at the time of his making the false representation aforesaid, well knew; and whereas, in truth and in fact, there were no parties interested in the said design, as represented by defendant; nor had any such parties asked defendant for the printer of the said silk handkerchiefs; nor had defendant given them plaintiff's name as the printer of the said silk handkerchiefs; nor did any such parties intend to proceed against plaintiff by injunction and order through the Court of Chancery; as defendant, at the time of his making the false and fraudulent representation and affirmation aforesaid, well knew. By means and in consequence of which false and fraudulent representation and affirmation, so made by defendant to plaintiff, plaintiff, believing the same to be true, and not knowing to the contrary thereof, was then led, caused and induced to, and did then, travel and journey a long distance, to wit from *Glasgow* to *London*, and there remain for a long time, to wit ten days, for the purpose of enquiring into the matters so represented and affirmed to plaintiff as aforesaid, and of endeavouring to satisfy the supposed parties whom defendant had represented as about to proceed against plaintiff, and to induce such supposed parties to forbear proceeding against plaintiff through the Court of Chancery, as defendant had represented they were about to do; as it was reasonable and proper for plaintiff to do under the circumstances aforesaid; and thereby was necessarily put to and incurred great expense of his, plaintiff's, moneys, amounting to a large sum, to wit 30*l.*, in and about the making of such journey as aforesaid, and of such enquiries as aforesaid,

and in and about staying and remaining in *London* and at divers places away from plaintiff's home for the purpose aforesaid, and in and about returning to plaintiff's residence, to wit at *Glasgow* aforesaid, and was also hindered and prevented, during his absence from home as aforesaid, from following or attending to his said trade or business in so ample a manner as he otherwise might and would have done; and also, by means of the said false and fraudulent representation and affirmation, plaintiff, believing the same to be true, and not knowing to the contrary thereof, was then caused and induced to, and did actually, abstain from printing or ornamenting and publishing a large number, to wit twenty thousand silk handkerchiefs, with the said pattern or design, in the way of his said trade or business, which he otherwise might and would have done, and which he, plaintiff, then had orders to do from divers persons, to wit &c. (naming them), and for the printing whereof plaintiff would have received divers large sums of money of the said persons, respectively amounting &c., to wit 1000*l.*; and was also caused to, and did, abstain from selling or disposing of a large number, to wit ten thousand silk handkerchiefs, which plaintiff had, before the committing &c., printed with the said pattern or design, and which plaintiff otherwise might and would have disposed of for large sums of money: and thereby plaintiff hath not only lost and been deprived of all the gains and profits amounting &c., to wit 50*l.*, which he might and otherwise would have made and derived from printing more of the said handkerchiefs with the said design, for reward to be paid to him in that behalf as aforesaid, and from selling and disposing of the said handkerchiefs which had been before so printed by

plaintiff with the said design as aforesaid, but also, by reason of the premises, the copper plates and engravings of the said pattern or design, then belonging to plaintiff, and being of great value, to wit 20*l.*, became and were rendered of no use or value to plaintiff: and, by means of the premises, also, defendant was enabled to, and did, acquire, exercise and enjoy the use, benefit and advantage of the said design or pattern for the ornamenting of silk handkerchiefs, to the exclusion of plaintiff, and was enabled to, and did, cause to be printed with the said design, and published and sold for his profit and advantage, a large number, to wit twenty thousand silk handkerchiefs, and was enabled to enjoy and take, and did enjoy and take, the profits and advantages arising from the application of such design to silk handkerchiefs as aforesaid, amounting &c., to wit 100*l.*, without the competition, opposition, rivalry or sharing of plaintiff therein, and to the exclusion of plaintiff from the benefits and profits thereof; and plaintiff hath been, and is, by means of the premises, otherwise greatly injured &c.

General demurrer: and Joinder.

The case was argued in last *Hilary* term (*a*).

Aspland for the plaintiff. No cause of action is shewn by the declaration. In 2 *Stark. Ev.* 374 (3d ed.) it is pointed out that the gist of the action for deceit is that the plaintiff was imposed upon by the fraud of the defendant; and it is said: "If therefore it appear that the plaintiff was aware of the falsity of the representation, or made the contract, to use a common phrase, with his

(*a*) *January* 23d, 1846. Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js.

eyes open to the defect, he is remediless, for he was not deceived. Nay, further, if he had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, or even if he placed a blind and wilful confidence in a representation which was not calculated to impose upon a man of ordinary prudence and circumspection, it seems that an action of deceit cannot be supported. For although the plaintiff in these cases may, in point of fact, have been deceived, yet it was a consequence of his own folly that he was so defrauded, and *vigilantibus non dormientibus jura subveniunt.*" In *Baily* v. *Merrell* (*a*) a carrier brought case for deceit in representing to him that a load, to be carried by his horses, was about eight cwt., whereas the weight was twenty cwt., whereby two of his horses were killed: and, after verdict for the plaintiff, the judgment was arrested, because the carrier might have weighed the load himself. Lord *Kenyon* recognises this case in *Pasley* v. *Freeman* (*b*), though, under the particular circumstances of the latter case, it was held, by himself and the majority of the Court, that the action lay, because the plaintiff had no peculiar means of knowledge. But here the plaintiff had as good means of knowing the facts as the defendant. The registering of designs is regulated by stat. 5 & 6 *Vict. c.* 100. The plaintiff might have searched, for the purpose of ascertaining whether there was any such registration as the defendant asserted. And he must have known that there was no obligation to give up his name, on the part of the defendant. Further, it does not appear that the damage is the neces-

(*a*) 3 *Bulst.* 94. (*b*) 3 *T. R.* 51. 64.

sary or natural result of what the defendant said to the plaintiff. That is essential, as well in an action of this kind as in an action for words; *Kelly* v. *Partington* (*a*), *Vernon* v. *Keys* (*b*). Further, the declaration is defectively framed. The innuendo, as to the defendant's meaning, introduces new matter not arising upon the inducement: there should have been a colloquium, explaining the subject of the conversation: and the words used should be set out, instead of their supposed effect; *Gutsole* v. *Mathers* (*c*). [*Coleridge* J. How do we see that the words are not given?] The representation is described in the third person. The declaration, without the innuendo, does not shew that the representation suggested that the copyright of the supposed registering parties still existed: there was no presumption that it did so, as it would last for only nine months under stat. 5 & 6 *Vict. c.* 100. *s.* 3. Nor does the declaration properly negative the truth of the representation: it states that there had been no registration according to the statutes; whereas the registration would be by virtue of only one statute.

Joseph Brown, contrà. The general principle is as said down in the passage cited from *Starkie on Evidence*, and in *Baily* v. *Merrell* (*d*): but the plaintiff is within that principle. He had no means of ascertaining the falsity of the representation, as the carrier had. No general right of inspection is given by stat. 5 & 6 *Vict. c.* 100. till after the copyright has expired; sect. 17. It

(*a*) 5 *B. & Ad.* 645. See *Knight* v. *Gibbs*, 1 *A. & E.* 43.

(*b*) 12 *East*, 632.

(*c*) 1 *M. & W.* 495; *S. C. Tyrwh. & Gr.* 694. See *Solomon* v. *Lawson*, 8 *Q. B.* 823, 837.

(*d*) 3 *Bulst.* 94.

is not shewn that any mark, such as is provided for by sect. 4, was described to him. There could be no such actual mark, as there was in fact no copyright: but the declaration does not shew that any mark was mentioned, so as to enable the plaintiff to ascertain the truth or falsehood. The damage was the natural result of the deceit; the plaintiff's conduct was precisely that of a reasonable man who believed the representation. It is said that the plaintiff might have known that the defendant was not bound to give up the plaintiff's name; but the only important part of the representation in this respect is, that he had in fact done so. There is nothing in the case of *Vernon* v. *Keys* (*a*) to shew that a false representation, knowingly made, with a view to benefit the party making it at the expense of the party to whom it is made, and producing the effect, is not actionable. The innuendo is unimportant: the Court will take notice of the effect of the statute, and the practice in Chancery as to injunctions. In actions for libel or slander the rule is as suggested on the other side; *Rex* v. *Horne* (*b*), *Harvey* v. *French* (*c*): but in such an action as the present, the office of an innuendo is altogether different. The doctrine of setting out words in declarations for slander, laid down in *Gutsole* v. *Mathers* (*d*), is inapplicable to actions for false representations; the judgment there expressly excepts the case: and it is not usual to set out more than the effect of the representation, explained by innuendoes, where necessary; *Pasley* v. *Freeman* (*e*), *Eyre* v. *Dunsford* (*g*), *Haycraft* v. *Creasy* (*h*),

(*a*) 12 *East*, 632.
(*b*) 2 *Cowp.* 672, 684.
(*c*) 1 *C. & M.* 11; *S. C.* 2 *Tyrwh.* 585.
(*d*) 1 *M. & W.* 495; *S. C. Tyrwh. & Gr.* 694.
(*e*) 3 *T. R.* 51.
(*g*) 1 *East*, 318.
(*h*) 2 *East*, 92.

Tapp v. *Lee* (*a*), *Hamar* v. *Alexander* (*b*), *Gainsford* v. *Blachford* (*c*), *Fuller* v. *Wilson* (*d*), *Evans* v. *Collins* (*e*), *Turnley* v. *Macgregor* (*g*); and so are the precedents in 2 *Chitt. Pl.* 516 &c. (7th ed.). *Taylor* v. *Ashton* (*h*) is an exception; there the representation was by a writing published and circulated. As to the objection that it does not appear (except by the innuendo) that the defendant represented the copyright as still existing, the whole of the representation, as set out, clearly shews that this was meant to be so understood, otherwise the intimation as to proceedings in Chancery would have been unmeaning. The truth of the representation is negatived in express terms: the word "statutes" is unimportant; but, if it were important, the objection would be answered by reference to stat. 6 & 7 *Vict. c.* 65., which enlarges stat. 5 & 6 *Vict. c.* 100.

Aspland, in reply. The representation was that the plaintiff's design was a copy: whether it was so or not must have been within his own knowledge.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*June* 2d), delivered the judgment of the Court.

The declaration, in substance, states that the plaintiff was a dealer in printed silk goods, and had sent the defendant divers lots of such goods, the last of which contained handkerchiefs which had been printed by plaintiff

(*a*) 3 *B. & P.* 367.
(*b*) 2 *New R.* 241.
(*c*) 6 *Price*, 36.
(*d*) 3 *Q. B.* 58.
(*e*) 5 *Q. B.* 804.
(*g*) 6 *Scott's N. R.* 906.
(*h*) 11 *M. & W.* 401.

with a certain ornamental pattern, and that he was about to print others in the same manner for profit, all which was known to defendant; yet defendant, contriving and craftily and subtilly intending to deceive, injure, and defraud the plaintiff, and to induce him to desist from so printing the same, and *deprive him of the profits, and to acquire the same for his own sole use and benefit*, and put him to great and unnecessary expense, falsely, fraudulently and deceitfully represented and affirmed to the plaintiff, of and concerning the said last lot, and the said handkerchiefs, that in the said last lot there was a copy of a registered pattern, and that the parties intended to proceed against the plaintiff in the most expensive manner, by injunction and order through the Court of Chancery (thereby meaning that the said pattern was a copy of a pattern registered according to the statutes &c.); whereas, in fact, no such pattern had been registered &c., and no parties did so intend, as defendant well knew: in consequence of which false representation plaintiff was induced to take a long journey, from *Glasgow* to *London*, for the purpose of enquiring into these matters, and of satisfying such supposed parties, and was hindered in his trade, and refrained from making goods of that kind according to orders theretofore received, &c.

To this declaration the defendant demurred generally.

The judgment which was given in this Court in *Evans* v. *Collins* (*a*), affirming the proposition that every false statement, made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy

(*a*) 5 *Q. B.* 804.

by action, has been overruled by the Court of Exchequer Chamber (*a*), which did not deny the authority of *Humphrys* v. *Pratt* (*b*), in the House of Lords, but thought it might be distinguished from *Evans* v. *Collins*. Whether, in point of reasoning, that distinction is very satisfactory, we need not inquire; for, having been established by the Court of Error, it must prevail. And, on the more general subject, we must admit the reasonableness of the doctrine there at length laid down. For, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, since plaintiff might be thereby prevented from attending to some duty or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame must be restrained within some limits. But an averment that the falsehood of his representation was known to him, and that he knowingly and wilfully uttered it, seems to carry the matter somewhat farther. If, indeed, the defendant were under any legal obligation to state the truth correctly to the plaintiff, there would be a grievance in misleading him, for which an action on the case would lie: still more so, if he made the false representation with a view to some unfair advantage to himself.

Now here, on minutely examining the allegations, though not very scientifically made, we think it sufficiently appears that the defendant uttered knowingly a deliberate falsehood on this subject, with a view to his own lucre. It is averred that he did so *with the design*

(*a*) *Collins* v. *Evans*, 5 *Q. B.* 820. (*b*) 5 *Bligh, N. S.* 154.

to deprive the plaintiff of the benefit of the last lot of goods, and to acquire it for his own sole use: and it is very plain that this object might have been effected in the manner alleged (by deterring plaintiff from bringing his goods into the market). The defendant has no right to say that the plaintiff was wrong in giving him credit for the truth of what he said; and there is no doubt that the special damage naturally flowed from the plaintiff's confidence in the defendant's false assertion.

We think, therefore, that the plaintiff has stated a good cause of action: and the demurrer must be overruled.

The objection, that the innuendo is larger than the representation, is answered by the remark that no innuendo was required.

Judgment for plaintiff.

ROBERT WAKEFIELD and BENJAMIN BINGLEY *against* GEORGE BROWN.

COVENANT. The declaration charged that, whereas heretofore, to wit 24th *November* 1830, by indenture then made between plaintiffs and *Samuel Wakefield*, *B.*, being owner of land for a term of sixty one years, granted to *S.* an annuity for lives, and, for securing it, assigned it, wanting one day, to *R.* By indenture, reciting the above facts, *R.*, at the request of *S.* and *B.*, did demise and lease, and *B.* did grant, demise, lease, ratify and confirm, to *O.* the land for thirty one years (ending some years before the term first mentioned), at a rent payable to *S.* while the land should remain subject to the annuity, and afterwards to *B.* And *O.*, for herself, her heirs, executors and administrators, covenanted to and with *S.* and *R.*, and their respective executors, administrators and assigns, and also to and with *B.*, his executors, administrators and assigns, that she, *O.*, her executors, administrators and assigns, would pay the rent to *R.*, while the premises should remain subject to the annuity, and afterwards to *B.*; and that she, her executors, administrators or assigns, would perform certain repairs, and would surrender at the end of the thirty one years to *B.* in good repair; and *B.* (alone) covenanted for quiet enjoyment. There was also a covenant, by *O.*, with *R.* and *B.*, to repair after certain notice.

Held that, after the death of *S.*, *B.* and *R.* might join in an action against the assignee of *O.* for breach of the first mentioned covenant to repair, the covenant being with *S.*, *B.* and *R.* jointly, and running with the land.

(since deceased) of the one part, and *Sophia Brown* of the other part (profert of counterpart, executed by *Sophia Brown*), plaintiff *Robert Wakefield*, at and by the request and appointment, as well of *Samuel Wakefield* as of *Benjamin Bingley*, testified by their severally being parties to and sealing and delivering the said indenture, did grant, demise, lease, ratify and confirm unto *Sophia Brown*, her executors, administrators and assigns, all those livery stables, with the dwellings over the same, together with the yard &c., (describing premises, in *Middlesex*, demised by one *Robert Sutton* to *Benjamin Bingley*), habendum to *Sophia Brown*, her executors, administrators and assigns, for the term of thirty one years from *Midsummer* day 1826, paying the yearly rent &c.: and *Sophia Brown*, for herself, her heirs, executors and administrators, did thereby covenant, promise and agree to and with the said *Samuel Wakefield* and *Robert Wakefield*, and with their respective executors, administrators and assigns, and also with and to the said *Benjamin Bingley*, his executors, administrators and assigns, that she, her executors, administrators and assigns, should and would, from time to time and at all times, during the term thereby granted, at her and their own charges, well and sufficiently repair, uphold, pave, cleanse, empty, amend and keep, in good and workmanlike manner and with the best materials, and to the satisfaction of the said *Benjamin Bingley*, his executors, administrators or assigns, and of the said *Robert Sutton*, his heirs or assigns, the whole of the said premises thereby demised, as well all and every the glass and other windows, &c. (specifying repairs &c., including painting the outside once in three years, and the inside once in five years), as by the said indenture &c.: By virtue of

which demise *Sophia Brown* afterwards, to wit 24th *November*, 1830, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term: Averment that, after making the indenture, and during the term thereby granted, to wit 30th *November* 1830, all the estate, right, title, interest and term of years then to come and unexpired, property, profit, claim and demand whatsoever, of *Sophia Brown* of and in the demised premises, with the appurtenances, legally came to, and vested in, defendant: whereupon defendant then entered into and upon all and singular the demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed from thence for a long space of time, exceeding the period of five years, to wit from thence until the commencement of this suit: And, although plaintiff *Benjamin Bingley* has always from the time of making the indenture &c. (averment of performance of all things on his part), according to the tenor and effect, true intent and meaning thereof, and although *Robert Sutton* is still living, yet defendant did not nor would, after the assignment and during the continuation of the demise, and whilst he was so possessed of the demised premises with the appurtenances, from time to time and at all times, at his own charges, well and sufficiently repair &c. (as in the recited indenture); but, on the contrary thereof, defendant, after he became possessed of the premises as aforesaid, and during the continuance of the demise, and whilst he was so possessed as aforesaid, to wit 30th *November* 1830, and from thence during all the time aforesaid, suffered and permitted the said premises, and

the glass and other windows, &c. (specifying neglect of certain repairs, including the painting, provided for in the recited indenture). And so plaintiffs in fact say that defendant (although often requested so to do) hath not kept the said covenants, so made by *Sophia Brown* for herself and her assigns, with plaintiffs, in manner and form aforesaid; but hath broken &c.

The defendant craved oyer of the indenture of 24th *November* 1830; and it was set out. The parties were *Samuel Wakefield* of the first part (*a*), *Robert Wakefield* of the second, *Benjamin Bingley* of the third, and *Sophia Brown* (widow and administratrix of *James Brown*) of the fourth.

It recited an indenture of 27th *August* 1830, between *Bingley* of the first part, *Samuel Wakefield* of the second, and *Robert Wakefield* of the third; whereby *Bingley* granted to *Samuel Wakefield* an annuity of 96*l*.. issuing and payable out of the premises thereby demised, for the lives of six nominees, and of the survivor, with powers of distress and entry, and perception of the rents and profits of the premises, in case of arrear: and, for better securing the payment, *Bingley* assigned the premises to *Robert Wakefield*, his executors, administrators and assigns, for the remainder of the term of sixty one years granted by *Robert Sutton*, wanting one day of the term, subject to the agreement in the lease after mentioned.

It recited also a written agreement, dated 30th *May* 1826, whereby *Bingley* agreed to grant to *James Brown* a lease of the premises after demised; and that *Samuel*

(*a*) It was objected that the deed, as set out, did not support the description in the declaration; but it was finally agreed that the declaration should be considered as amended, so as to agree with the deed.

Wakefield had agreed to concur in the manner after expressed.

It was then witnessed that, in pursuance of the agreement, and in consideration of 150*l.* paid by *James Brown* in his lifetime, and also of 100*l.* paid to *Bingley*, with the approbation of *Samuel Wakefield*, by *Sophia Brown*, and of the rents and covenants after reserved and contained, and by and on the part and behalf of the said *Sophia Brown*, her executors, administrators and assigns, to be paid and performed, *Robert Wakefield*, at and by the request and appointment of *Samuel Wakefield* and *Benjamin Bingley*, "hath demised and leased, and by these presents doth demise and lease, and the said *Benjamin Bingley* hath granted, demised, leased, ratified and confirmed, and by these presents doth grant, demise, lease, ratify and confirm, unto the said *Sophia Brown*, her executors, administrators and assigns, all" &c. (describing the dwelling houses as in the declaration, and as granted by *Sutton* to *Bingley* by indenture, dated 21st *October* 1826); habendum to *Sophia Brown*, her executors, administrators and assigns, for thirty one years from Midsummer 1826, "yielding and paying, therefore, yearly and every year, during such part of the said term as the said premises shall remain subject and liable to the payment of the said annuity, unto the said *Samuel Wakefield*, his executors, administrators and assigns, the rent or sum of 160*l.* of lawful" &c., "and, from and after the repurchase, redemption or cessation of the said annuity, yielding and paying, yearly and every year, during the then residue of the said term, the like yearly rent or sum of 160*l.* unto the said *Benjamin Bingley*, his executors, administrators and assigns:" "And the

said *Sophia Brown*, for herself, her heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said *Samuel Wakefield* and *Robert Wakefield*, and with their respective executors, administrators and assigns, and also with and to the said *Benjamin Bingley*, his executors, administrators and assigns, in manner following: that is to say: That she, the said *Sophia Brown*, her executors, administrators and assigns, shall and will, from time to time, and at all times, during so much of the said term hereby granted as the said premises shall continue chargeable with and liable to the payment of the said annuity as aforesaid, well and truly pay or cause to be paid unto the said *Robert* (*a*) *Wakefield*, his executors, administrators and assigns, and from thenceforth, during the then residue thereof, unto the said *Benjamin Bingley*, his executors, administrators and assigns, the said yearly rent or sum of 160*l.* of lawful" &c., "as aforesaid, on the days and times hereinbefore appointed for the payment thereof, according to the reservation aforesaid, and the true intent and meaning of these presents." "And also that she, the said *Sophia Brown*, her executors, administrators or assigns, shall and will, from time to time and at all times, during the term hereby granted, at her and their own charges, well and sufficiently repair" &c., (as in the declaration, p. 210, antè); "and also shall and will, at the expiration or other sooner determination of the said term hereby granted, which shall first happen, peaceably and quietly leave, surrender and yield up unto the said *Benjamin Bingley*, his executors, administrators, and assigns, all and singular the said premises hereby demised" &c.,

(*a*) See p. 221. post.

in good repair. Then followed a power for *Robert Wakefield* and *Bingley*, their respective executors, administrators or assigns, as also for *Robert Sutton*, his heirs or assigns, to enter and view the premises, and, in case of want of reparation &c., "to give or leave notice or warning, in writing, at the said demised premises, or in some part thereof, to and for the said *Sophia Brown*, her executors, administrators or assigns, forthwith to repair, cleanse, and amend the same; and within the time" of three calendar months next after such notice, "she, the said *Sophia Brown*, doth hereby, for herself, her heirs, executors and administrators, covenant and agree to and with the said *Robert Wakefield* and *Benjamin Bingley*, their respective executors, administrators and assigns, well and sufficiently to repair" &c. "according to such notice, to the satisfaction of the said *Robert Wakefield* and *Benjamin Bingley*, their respective executors, administrators and assigns, and of the said *Robert Sutton*, his heirs or assigns, and every of them": "And the said *Benjamin Bingley*" did thereby, "for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said *Sophia Brown*, her executors, administrators and assigns, that she, the said *Sophia Brown*, her executors, administrators and assigns, "paying the rent and keeping the covenants," should peaceably and quietly have and enjoy &c., without let &c. by *Bingley*, *Samuel Wakefield*, and *Robert Wakefield*, their or either of their executors, administrators and assigns, or any person claiming under them or either of them; and that *Bingley*, his executors, &c., should indemnify *Sophia Brown*, her executors, administrators or assigns, from the rent

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reserved under the lease by which *Bingley* held, and against the annuity: and for the production of the lease and all subsequent deeds.

General demurrer and joinder.

The case was argued in last *Hilary* term (*a*).

Watson for the defendant. The covenant, on which this action is brought, was made with *Samuel Wakefield* and *Robert Wakefield* and *Bingley*. The plaintiffs assume this to be a joint covenant; and the action is brought by the two surviving covenantees, *Robert Wakefield* and *Bingley*. But it is brought, not against the original covenantee, but against her assignee; and the defendant is therefore liable only at common law by privity of estate. There is no privity of contract between the lessor and the assignee of the lessee. But the demise to the original covenantor was by *Robert Wakefield* only: there is no privity of estate between the defendant and *Bingley*, who is only the reversioner by a title paramount to the lease containing the covenant; and *Samuel Wakefield* never had any legal interest at all. A covenant with a stranger cannot run with the land. In *Webb* v. *Russell* (*b*) a mortgagor and mortgagee joined in a lease; but the lessee covenanted with the mortgagor only: and it was held that the lessee was not liable to an assignee of the mortgagee. The different covenants in this lease are not all to the same parties; so that the intention seems to have been to avoid a general liability. [*Coleridge* J. If *Robert*

(*a*) *January* 23d, 1846. Before Lord *Denman* C. J., *Patteson*, and *Coleridge* Js.

(*b*) 3 *T. R.* 393.

Wakefield could sue alone on this covenant, you probably would admit that he could sue this defendant, in respect of privity of estate.] That would seem to be so. [*Coleridge* J. In *Webb* v. *Russell* (*a*) the action was not resisted, as here, on the ground that the defendant was not the original covenantor.] In *Anderson* v. *Martindale* (*b*) the defendant covenanted with *A.* and *B.* that *C.* should pay *A.* an annuity: and it was held that *A.* and *B.* must join in an action upon this covenant: that was a covenant in gross; and both *A.* and *B.* were interested in the cause of action. From *Eccleston* v. *Clipsham* (*c*) it appears that, even where a party covenants with two jointly and severally, yet, if their interest be joint, they must sue jointly: but, if the interests be several, they should sue singly. Here *Bingley* has no interest. [*Patteson* J. If the covenant run with the land as to one, must it not do so as to the two, if they can join?] If both these plaintiffs had died, but *Samuel Wakefield* had survived, it seems clear that *Samuel*, having no interest to which privity of estate could attach, could not have sued the assignee here. But, further, it may be contended that *Bingley* is not a joint covenantee with the two *Wakefields*, even by the language of the indenture, which puts the two together, and then adds "and also" with and to *Bingley*. In *Servante* v. *James* (*d*) a covenant with part owners of a vessel, and their several executors &c., was held to be several only, and that principally on account of the separation of the executors: here is a similar separation. The reddendum is to *Samuel Wakefield*, while the an-

(*a*) 3 *T. R.* 393.
(*b*) 1 *East*, 497.
(*c*) 1 *Saund.* 153.
(*d*) 10 *B. & C.* 410.

nuity lasts. If tenant for life and remainder man in fee make a lease by deed, it is, during the life of the tenant for life, his lease and the remainder man's confirmation; after the death of the tenant for life, it is his confirmation and the lease of the remainder man; *Treport's Case* (*a*). This seems to shew that, during the estate of *Robert Wakefield*, the lease here must be considered as his lease and the confirmation of *Bingley*: therefore, if *Bingley* had any interest in the covenant, it would be distinct from that of *Robert Wakefield*. [*Patteson* J. In *Smith* v. *Pocklington* (*b*) a mortgagee in fee joined with the owner of the equity of redemption in a lease; and it was held that the two could not be sued jointly on an implied covenant for title.]

Crowder, contrà. First, the plaintiffs were bound to sue jointly on this covenant. *Anderson* v. *Martindale* (*c*) is exactly in point as to this. [*Coleridge* J. Certainly, if *Bingley* were out of the question, the two *Wakefields*, while both lived, might have sued jointly.] If so, *Bingley* must now be joined. [*Coleridge* J. He has a distinct interest.] The action cannot be joint as to two and several as to the third. [*Patteson* J. *Anderson* v. *Martindale* (*c*) may come only to this; that a covenant with two to pay one of them may, by its terms, be a joint covenant.] When the terms are such as to correspond with either a joint or a several covenant, the interests of the parties must be looked to, in order to see whether they are the same. But a severalty of interest does not prevent parties from joining in an action on a

(*a*) 6 *Rep.* 14 *b.* (*b*) 1 *C. & J.* 445; *S. C.* 1 *Tyrwh.* 309.
(*c*) 1 *East*, 497.

covenant which is joint by its terms; *Sorsbie* v. *Park* (*a*), recognised in *Mills* v. *Ladbroke* (*b*). Here the terms are those belonging to a joint covenant. Some stress, on the other side, appears to be laid upon the word "respective." [*Patteson* J. If that word were absent, the meaning would be the same: there cannot be joint executors. But I think the words "and also" are enough to prevent us from saying that the covenant, by its terms, is necessarily joint.] If the interests are looked to, both plaintiffs have an interest in the performance of the covenant: *Bingley* is the reversioner, and *Robert Wakefield* the immediate legal owner. *Foley* v. *Addenbrooke* (*c*) and *Hopkinson* v. *Lee* (*d*) are authorities in favour of the plaintiffs. Secondly, the assignee is liable to this action. The covenant is not in gross. If *Robert Wakefield* were entitled to maintain the action by himself, he unquestionably could sue the assignee in respect of privity of estate, at common law, the original covenantor having covenanted for the act of herself and her assigns, and the covenant affecting the thing demised; *Spencer's Case* (*e*). The same rule is recognised in *The Mayor, &c. of Congleton* v. *Patteson* (*g*). Then it does not lie in the assignee's mouth, after he has taken a term subject to a covenant which runs with the land, to say that the covenant is in gross because the covenantees have different interests in the land. "If tenant of the land and a stranger join in a lease for years by indenture, this is the lease only of the tenant, and the confirmation of the stranger; and yet the lease operates, as to the stranger, by way of conclusion, and

(*a*) 12 *M. & W.* 146.
(*b*) 7 *M. & G.* 218.
(*c*) 4 *Q. B.* 197.
(*d*) 6 *Q. B.* 964.
(*e*) 5 *Rep.* 16 *a.*
(*g*) 10 *East*, 130.

so it does to the lessee with respect to the stranger, because he having nothing in the lands, the indenture could no otherwise take effect as to him:" 4 *Bac. Abr.* 854, tit. *Leases and Terms for Years* (O), 7th ed. This furnishes a rule for interpreting, as between the parties to an indenture, the nature of the interest. It is a kind of conclusion, though not indeed a mere estoppel, since an interest passes.

Watson in reply. The plaintiffs are not without their remedy. They may sue the original covenantor, as on a covenant in gross, and leave her to seek her remedy from her assignee. The terms of the covenant here expressly make it several; and therefore it is not necessary to impeach the authority of the cases cited, which are explained in *Bradburne* v. *Botfield* (*a*). The damages would accrue on different principles to the different parties. *Slingsby's Case* (*b*) shews that the actual right in respect of interest cannot be varied by any language of the parties, more than a right of way, or a right to distrain, could, in a lease, be reserved to a stranger. But, if the covenant be joint, then it cannot run with the land, inasmuch as there is no privity of estate between the tenant and the three jointly. The passage cited from *Bacon* relates only to a case of joint demise: here the demise is by one only.

Cur. adv. vult.

Lord DENMAN C.J., in this term (*June* 2d), delivered the judgment of the Court.

This was an action of covenant for non-repair pursuant to the terms of a lease, which is set out on oyer,

(*a*) 14 *M. & W.* 559. (*b*) 5 *Rep.* 18 *b.*

and is made between *Samuel Wakefield* of the first part, *Robert Wakefield* of the second part, *Benjamin Bingley* of the third part, and *Sophia Brown* of the fourth part.

By the recitals, it appears that *Bingley*, having a term of sixty one years granted by *Robert Sutton*, granted an annuity to *Samuel Wakefield*, and, for securing the payment, assigned the term of sixty one years, wanting one day, to *Robert Wakefield;* then, by the lease, *Robert Wakefield*, at the request of *Samuel Wakefield* and of *Bingley*, demised, and *Bingley* demised and confirmed, the premises to *Sophia Brown*, for thirty one years, yielding and paying rent to *Samuel Wakefield* whilst the premises remained subject to the annuity, and afterwards to *Bingley*. *Sophia Brown* then covenants to and with the said *Samuel Wakefield* and *Robert Wakefield*, and their respective executors, administrators and assigns, and also to and with the said *Benjamin Bingley*, to pay the rent, whilst the premises are subject to the annuity, to *Robert Wakefield*, and, afterwards, to *Bingley*, and also to repair and to paint the premises outside once in three years, and inside once in five years.

The declaration alleges that the premises came to the defendant by assignment, and that afterwards he committed a breach of covenant in not painting.

To this declaration there is a general demurrer. The objection is, that the action should have been brought by *Robert Wakefield* alone, and that there is no privity of estate between the defendant and *Bingley*. *Samuel Wakefield* is alleged by the declaration to be dead.

The indenture is strangely drawn; for it reserves rent to *Samuel Wakefield*, and the covenant is to pay it to *Robert Wakefield*. The covenant is to surrender to

Bingley at the expiration of the term of thirty one years; and *Bingley* alone covenants for quiet enjoyment. There is also a provision for notice to repair, and a covenant with *Robert Wakefield* and *Bingley*, omitting *Samuel Wakefield*, to repair after such notice. The present question, however, arises on the general covenant to repair and to paint. That covenant is with the two *Wakefields* jointly, and with *Bingley*.

If *Samuel Wakefield* had been alive, it is plain that *Robert Wakefield* could not have sued without joining him; for *Samuel Wakefield* had no legal interest in the premises, and the case is therefore directly within the authority of *Anderson* v. *Martindale* (*a*). Now, if this was a joint covenant with the two *Wakefields*, one of whom had no legal interest, it is difficult to say how it could be a several covenant with *Bingley* in respect of his reversion of a day, and so, as regards him, the covenant with the *Wakefields* be considered several, as perhaps it might have been if the assignment to secure the annuity had been to both the *Wakefields*. This case appears to come within the authorities of *Sorsbie* v. *Park* (*b*), *Mills* v. *Ladbroke* (*c*), *Bradburne* v. *Botfield* (*d*), and is in no wise inconsistent with the case of *Hopkinson* v. *Lee* (*e*). The case which comes nearest to the present is *Foley* v. *Addenbrooke* (*g*), in which it was held that, where the interest in the cause of action is joint, the action must be in the joint names of the covenantees. Neither is it necessary in this case, any more than in *Bradburne* v. *Botfield* (*d*), to determine whether one of several lessors can sue on a covenant with all to repair.

(*a*) 1 *East*, 497.
(*b*) 12 *M. & W.* 146.
(*c*) 7 *M. & G.* 218.
(*d*) 14 *M. & W.* 559.
(*e*) 6 *Q. B.* 964.
(*g*) 4 *Q. B.* 197.

That they may join is clear; *Kitchin* v. *Buckley* (*a*); which is so far an authority for the plaintiffs in the present case.

The other objection, that there is no privity of estate, is certainly not tenable. A covenant to repair and paint clearly runs with the land; and there is privity of estate between the defendant and one of the plaintiffs, *Robert Wakefield*, at all events.

The judgment must be for the plaintiffs.

Judgment for plaintiffs.

(*a*) *T. Raym.* 80.

SAMUEL COCKER *against* MUSGROVE and MOON.

Declaration in case, by execution creditor against sheriff, stated that plaintiff sued out a fi. fa.

CASE. The declaration stated that plaintiff heretofore, and before the committing &c., to wit on &c., in the Queen's Bench, recovered judgment against *S.*, and delivered it to defendant to be executed; that within defendant's bailiwick were goods of *S.* sufficient to satisfy five writs of fi. fa. after mentioned, and the rent after mentioned, and also other goods of *S.*, whereof defendant might have levied the moneys directed to be levied by plaintiff's fi. fa.; of which defendant had notice, and took in execution goods of *S.* of value sufficient to satisfy the five other writs, the rent, and plaintiff's writ, but did not, in reasonable time, levy the moneys under plaintiff's writ: but falsely returned that, before the delivery of plaintiff's writ, five other writs of fi. fa. were delivered to defendant, by virtue whereof he took in execution goods of *S.*, which remained in his hands for want of buyers; and that, after the seizure, he had notice that a year's rent was due to the landlord of the premises where the goods were seized, of which plaintiff and the five other execution creditors had notice, but none of them had paid the rent; and that *S.* had no other goods whereof defendant could cause to be made the debt &c. in plaintiff's writ.

Plea: that there were not, at the time of the delivery of plaintiff's writ, and while it remained in force, any goods of *S.*, besides the goods sufficient to satisfy the five other writs and the rent, in defendant's bailiwick, whereof defendant had notice, or could, or might, or ought to have levied the moneys directed to be levied by plaintiff's writ, in manner and form &c.

Held: That defendant supported his plea by proof that the rent was due, that he had notice thereof, that plaintiff and the other execution creditors had also notice thereof, and that none of them had paid the rent: stat. 8 *Ann.* c. 14. *s.* 1. prohibiting such a taking and removal of the goods as will amount to a levy, until the rent is paid.

Francis Steinitz for a debt of 10*l.* 18*s.* 8*d.*, and also 5*l.* 5*s.* for damages &c., and costs &c.; and, on &c., sued out of the said Court a fieri facias, directed to the sheriff of *Middlesex*, commanding him that out of the goods and chattels of *F. S.* in his bailiwick he should cause to be made the debt and damages aforesaid, together with interest &c., returnable immediately after the execution &c.; which writ was indorsed with a direction to levy the whole, with 17*s.* 6*d.* for the writ, sheriff's poundage &c., and, so indorsed, afterwards and before the execution thereof, to wit on &c., was delivered to the now defendants, who then, and thence and until and at and after the execution of the writ, were sheriff of *Middlesex*, to be executed &c.; "and, although there were within the said bailiwick of the defendants, as such sheriff as aforesaid, then and afterwards and whilst the said writ remained in full force, not only divers goods and chattels of the said *F. S.* sufficient in value to satisfy five other writs of fieri facias, and also the rent, hereinafter mentioned, but also divers other goods and chattels of the said *F. S.*, whereof the defendants, as such sheriff as aforesaid, could and might and ought to have levied the moneys so endorsed" &c., "whereof" &c. (notice to defendants); "and although the said sheriff, by virtue of the said five writs hereinafter mentioned, caused to be seized and taken in execution divers goods and chattels of the said *F. S.*, in his bailiwick, of a much greater value than the sum of 200*l.*, to wit of the value of 1000*l.*, and which said goods and chattels were of sufficient value to satisfy, not only the said five other writs of fieri facias and the said rent, but also the said writ first above mentioned: yet the now defendants, so being

sheriff" &c., "not regarding the duty" &c., but contriving &c., and to deprive plaintiff "of the moneys so indorsed on the said first mentioned writ," &c., "and of the means of obtaining the same, did not nor would, within a reasonable time for that purpose, which hath long since elapsed, levy the money last aforesaid, or any part thereof, but wholly neglected" &c., "and therein failed" &c., "and afterwards, to wit on" &c., "falsely and deceitfully returned to the said Court of our said Lady the Queen that, before the delivery to the said defendants, as such sheriff as aforesaid, of the said first above mentioned writ of fieri facias, five certain other writs of fieri facias were respectively delivered to them, as such sheriff as aforesaid: to wit: the first thereof on" &c.: the dates of the delivery, and other particulars, of the five writs were then stated: they were at the suit, respectively, of *Arnold*, *Williams*, *Barker*, *Gilham* and *Ridley*, in different Courts and different forms of action, and indorsed to levy amounts some greater and some less than that for which plaintiff's writ was indorsed: all the writs were described as directed against the goods and chattels of *F. S.*, returnable immediately after execution: "and that, by virtue of the said five writs so delivered" &c., the sheriff "caused to be seized and taken in execution divers goods and chattels of the said *F. S.* in his said bailiwick, of the value of 200*l.*, which said goods and chattels remained in his hand for want of buyers: And he further certified and returned that, after the seizure thereof as aforesaid, to wit on" 20th *July* 1844, "he received notice that the sum of 295*l.* remained due to the landlord of the premises whereon the said goods and chattels were seized, for arrears of rent of the said premises, not exceeding one year at

the time of such seizure; And that the said *L. Arnold*," &c. (naming the five execution creditors besides the plaintiff), "and *Samuel Cocker*, in the said writ thereto annexed (*a*), respectively had notice thereof, but had not, nor had either of them, or any other person or persons on their behalf, paid the same pursuant to the statute in that case made and provided: And that the said *F. S.* had not any other or more goods, chattels, money," &c., " in his bailiwick, whereof he could cause to be made the debt and damages in the said writ first above mentioned, or any part thereof: As by the said last mentioned writ and the return thereof" &c. " By means of which said several premises the plaintiff hath been and is greatly injured and deprived of the means of obtaining the said moneys so endorsed on the said writ first above mentioned, and directed to be levied as aforesaid; and which are still wholly unpaid; and is likely to lose the same: To the damage" &c.

Plea 2. That there were not, at the time of the delivery to defendants of the said writ firstly above mentioned, or at any time afterwards and whilst the said writ remained in full force, any goods or chattels of the said *F. Steinitz*, besides the said goods and chattels, sufficient in value to satisfy the said five other writs of fieri facias and the said rent in the declaration mentioned, within the bailiwick of the defendants, as such sheriff as aforesaid, whereof the defendants or either of them had notice, *or could or might or ought to have levied the said moneys indorsed on the said writ first mentioned and directed to be levied as aforesaid, or any part thereof,*

(*a*) Sic.

in manner and form as the plaintiff hath above alleged. Conclusion to the country. Issue thereon.

Other issues in fact were joined.

On the trial, before *Wightman* J., at the *Middlesex* sittings after *Hilary* term, 1845, evidence was given to shew that the defendants had seized goods of *Steinitz;* that, after the seizure and before any sale, they had notice, as the fact was, that a year's rent was due to the andlord of the premises: that the goods seized were of a value sufficient to satisfy the rent, the plaintiff's writ, and the other five writs; and that the defendants gave notice to the plaintiff and the other five execution creditors of the rent being due; but that it had not been paid (*a*). It was argued, for the defendants, that, on this evidence, the issue on the second plea must be found for them, inasmuch as, by stat. 8 *Ann. c.* 14. *s.* 1., they could not levy by sale the money to satisfy the writ of an execution creditor until he had paid the rent. The learned Judge told the jury that, if they were of opinion that there were goods sufficient to satisfy the rent and the six executions, the plaintiff was entitled to a verdict on this issue. Verdict for plaintiff on all the issues.

Bovill, in *Easter* term, 1845, obtained a rule nisi for a new trial, on the ground of misdirection as to the issue on the second plea.

In last *Hilary* term (*b*),

(*a*) These facts, relied upon for the defendants, were assumed by the Court in their judgment. On the argument in banc, there arose some discussion how far they had been actually proved: but the counsel for the defendants insisted that they were at any rate admitted by the mode in which the plaintiff's case was shaped on the record and at the trial.

(*b*) *January* 12th and 13th, 1846. Before Lord *Denman* C. J., *Tatteson*, *Coleridge* and *Wightman* Js

Watson shewed cause. The sheriff ought, according to the ordinary practice, to have sold the goods, and, after paying the rent from the proceeds, handed over the residue to the execution creditors. The question arises on stat. 8 *Ann. c.* 14. *s.* 1., which enacts that no goods or chattels, being in or upon any messuage, lands &c., "leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution," "unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money." The words of the statute undoubtedly appear to throw upon the execution creditor the duty of satisfying the rent: but the practice is otherwise. [Lord *Denman* C. J. The word "taken" seems ambiguous; the rent is to be paid "before the removal." *Patteson* J. It would seem that the sheriff is not to pay the rent, because the landlord would have that before the sheriff could take or the goods be removed.] The literal direction of the statute is never

followed: if the sheriff sells without paying the year's rent, the landlord recovers from him so much of that rent as is covered by the sale. [*Patteson* J. According to the words, the taking becomes unlawful by the removal without payment of rent. *Coleridge* J. From the last words of the section it appears that the sheriff is to take enough to satisfy both the year's rent and the writ.] And he has poundage on the whole so taken (*a*). The meaning must be that, if the sheriff removes, he must pay the year's rent, at least so far as the produce of the sale goes. [*Coleridge* J. The landlord's action is for damages: and it is consistent with the words of the statute, because he complains that the sheriff has taken and removed without the rent having been paid.] The sale may be made without a removal. If the sheriff return that he has levied enough for the rent and the writ, he may be sued for money had and received: he holds the money to the use of the landlord and the execution creditor: or the landlord may bring a special action on the case, alleging the removal. In *Riseley* v. *Ryle* (*b*) *Parke* B. said: "The provision of the statute is, that the sheriff shall not *take* the goods unless the landlord's rent be paid before their *removal*, that is, shall not remove them unless the rent be first paid. That may well be translated as directing that the sheriff shall pay the rent to the landlord before the removal of the goods, or else shall be liable for damages." In *Ryan* v. *Daly* (*c*)

(*a*) See *Davies* v. *Edmonds*, 12 *M. & W.* 31.

(*b*) 11 *M. & W.* 16. 19.

(*c*) 2 *Jones's Irish Exch. Ca.* 299. There *O'Loghlen* B. said (p. 302) that the civil bill act, 2 *G.* 1. *c.* 11. (*Irish*), *transferred* the sheriff's liability in debt to the plaintiff. But the judgment of *Pennefather* B., which appears to be that of the whole Court, afterwards treats the case as

(cited in *Riseley* v. *Ryle* (*a*)) the *Irish* Court of Exchequer held that the landlord might sue the execution creditor (under a civil bill decree) in debt for removing the goods before the rent was paid. [*Patteson* J. The execution creditor has nothing to do with the seizure or removal: the sheriff is not to take unless the execution creditor pay the rent before removal. To be sure the statute afterwards says that the execution creditor, having paid the rent, "may proceed to execute his judgment:" but the seizure must be the sheriff's act. *Coleridge* J. It has been held that, where the sheriff has levied, the landlord cannot treat the proceeds as money had and received to his own use (*b*).] Probably he might if the sheriff returned that he had levied enough for both the rent and the writ. [*Coleridge* J. referred to *Rotherey* v. *Wood* (*c*).] On the other side *Calvert* v. *Joliffe* (*d*) will be cited. There the landlord brought case against the sheriff, who had sold without the rent being paid: and this Court refused to stay the action on terms, upon payment into court of the sum produced by the sale, which was less than the rent, holding that the plaintiff had a right to the opinion of a jury as to the damages, which were not necessarily measured by the proceeds of the sale. [*Patteson* J. I think that case went on the principle that the payment of rent was a necessary preliminary

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identical with that of the execution creditor under the *Irish* stat. 9 *Ann.* c. 8. s. 1., which substantially corresponds with the *English* stat. 8 *Ann.* c. 14. s. 1.

(*a*) 11 *M.* & *W.* 20.

(*b*) See *Green* v. *Austin*, 3 *Campb.* 260.

(*c*) 3 *Campb.* 24.

(*d*) 2 *B.* & *Ad.* 418.

to the removal: we have here the fact that the sheriff has levied enough to satisfy the rent and all the executions.] The Court refused to stay the proceedings because the action was in tort, and sounded in damage. [*Patteson* J. We do sometimes stop proceedings in tort; as in trover, where the chattel converted is given up and costs paid.] The taking forbidden is the removal. [*Coleridge* J. Is there any instance of an action brought against a purchaser under the execution for removing? Can the sheriff prevent that, after the sale?] He may insist on the goods remaining till the rent is paid. [*Patteson* J. Can he say to the vendee, you shall not remove your goods till the execution creditor has paid the rent?] The second plea does not raise the point. [*Patteson* J. If the sheriff followed the statute, understood in the sense contended for on the other side, he could not levy on any goods until the rent was paid.] He might raise the money by the sale, and yet not allow the goods to go off the premises.

Bovill and *Wise*, contrà. The question is, whether the defendant has either omitted to levy where he could have done so, or made a false return. Both questions turn on the meaning of the word "levy." A levy is effected only by the sale of goods applicable to the plaintiff's writ; *Drewe* v. *Lainson* (*a*), *Stubbs* v. *Lainson* (*b*). Those cases shew that the traverse in the second plea raises the question, whether the proceeds here are applicable to the plaintiff's writ: and *Wintle* v.

(*a*) 11 *A. & E.* 529.
(*b*) 1 *M. & W.* 728; *S. C. Tyrwh. & G.* 1000.

Freeman (*a*) and *Heenan* v. *Evans* (*b*) are direct decisions to the same effect. There was, therefore, a misdirection if the proceeds here were not applicable to the plaintiff's writ; and that depends on stat. 8 *Ann. c.* 14. *s.* 1. The object of that statute was to preserve to the landlord his remedy by distress; and, therefore, the goods are not to be taken out of his power; per *Pratt* C. J. in *Henchett* v. *Kimpson* (*c*); argument of counsel in *Palgrave* v. *Windham* (*d*): and this general view is illustrated by the provision of stat. 7 & 8 *Vict. c.* 96. *s.* 67. [*Watson* referred to *Peacock* v. *Purvis* (*e*).] Whether under stat. 8 *Ann. c.* 14. *s.* 1. the sheriff could seize at all it is not necessary now to decide: at any rate he could not levy; for there must be a taking in order to levy, and the taking is forbidden. In *Calvert* v. *Joliffe* (*g*) the Judges treated the statute as requiring, in strictness, payment of rent before the removal; and they considered that the practice of selling the goods and paying the landlord out of the proceeds was only matter of convenience. The language of the Court in *Henchett* v. *Kimpson* (*c*) points to the same result. *Parke* B., in *Riseley* v. *Ryle* (*h*), holds the taking in the statute to mean "a substantial taking for the satisfaction of the debt, that is, by the removal and sale of the goods, without payment of the rent." The sheriff is not bound to take on himself the risk of the goods not realizing the amount of the rent: and, if he sells at all and the rent is not paid, he is clearly liable to an action. He has here returned the facts, which are not denied by the plaintiff,

(*a*) 11 *A. & E.* 539.
(*b*) 3 *M. & G.* 398.
(*c*) 2 *Wils.* 140.
(*d*) 1 *Str.* 212, 213.
(*e*) 2 *Br. & B.* 362.
(*g*) 2 *B. & Ad.* 418.
(*h*) 11 *M. & W.* 16, 21.

except as to his allegation that there were no goods from which he could levy. The plaintiff could not have compelled a sale by venditioni exponas, under these circumstances. A return similar to the present appears in *Stuart* v. *Whitaker* (*a*): but probably such a return is not common, since it will seldom happen that no one will venture to pay the year's rent. In *Rotherey* v. *Wood* (*b*) Lord *Ellenborough* said: "In future it will be better for landlords to have their rent before they suffer their tenant's goods to be sold in execution." The landlord cannot sell his distress for five days: the sheriff may sell as soon as he has seized: the statute, to prevent collusion, enables the execution creditor to take upon himself the payment of the rent, and then call upon the sheriff to proceed, and levy sufficient to repay him the amount of the rent as well as the sum receivable on his writ. The mere knowledge by the sheriff that rent is due to the landlord is enough to stop his power to sell, without express notice; *Andrews* v. *Dixon* (*c*). It may possibly be that the sheriff may contract for the sale of the goods, and yet not be liable to the landlord until the removal; *Smallman* v. *Pollard* (*d*), overruling *West* v. *Hedges* (*e*), as reported in *Barnes*: but the levy, in its full sense, cannot be effectuated before the rent is paid. Sect. 3 of stat. 8 *Ann. c.* 14. prevents the landlord from distraining goods bonâ fide sold. [*Coleridge* J. May not that mean a common sale between vendor and vendee (*g*)?] The statute will be interpreted according to its plain grammatical sense, in accordance with the

(*a*) 2 *C. & P.* 100.
(*b*) 3 *Campb.* 25.
(*c*) 3 *B. & Ald.* 645.
(*d*) 6 *Man. & G.* 1001.
(*e*) *Barnes*, 211.
(*g*) It appears to be a qualification of the enactment in sect. 2.

general principle recognized by the Court of Exchequer in *Smith* v. *Bell* (*a*).

Cur. adv. vult.

Lord DENMAN C. J., in this term (*June* 9th), delivered the judgment of the Court.

This was an action against the sheriff of *Middlesex* for not levying under a writ of fieri facias. The declaration stated that there were goods out of which the defendants might and ought to have levied. One of the pleas traversed that allegation. The facts were that five executions had come into the sheriff's hands; that there was rent in arrear from the execution debtor, of which the several plaintiffs had notice; but no one of them chose to pay the rent. The sheriff returned those facts. The jury found that there were goods sufficient to pay the rent and the executions; and a verdict was found for the plaintiff under the direction of the learned Judge.

The defendants now contend that, upon the true construction of stat. 8 *Ann. c.* 14., they were not bound, nor even at liberty, to sell the goods, until the rent was paid by one of the execution creditors.

The practice undoubtedly has been very general for the sheriff to sell in such cases, and out of the proceeds to satisfy the landlord in the first instance: and, if he does so sell, he is liable to an action if he does not pay the landlord. Many cases shew this, to which it is not necessary to refer. Some will be found in *Wintle* v. *Freeman* (*b*), and the statute still more discussed in *Risley* v. *Ryle* (*c*). In the latter case (*d*) *Parke* B. says,

(*a*) 10 *M. & W.* 378. 389.
(*b*) 11 *A. & E.* 539.
(*c*) 11 *M. & W.* 16.
(*d*) P. 20

"Construing the act as it has hitherto been construed, it means, that the sheriff is not to remove the goods unless the rent has been first paid by somebody; if he does, he is liable to an action at the suit of the landlord." The sheriff is not called upon by law to advance money to pay the rent: it is plain that such advance must be made by the execution creditor; and, if he neglects to make it, after notice of the rent being due at all events (and it is not necessary now to say whether notice be requisite), the sheriff cannot be called upon to sell the goods, let their value be what it will. Until the rent be paid, there are no goods out of which the sheriff is bound to levy, that is, which he is bound to sell.

We are, therefore, of opinion that the rule for a new trial in this case must be made absolute.

Rule absolute (*a*).

(*a*) See stat. 9 & 10 *Vict. c.* 95. *s.* 107.

The QUEEN *against* SANDERS and Others.

June 4th.

On indictment for keeping a disorderly house, the power of the Court to grant a certiorari at the defendant's instance is taken away by stat. 25 *G.* 2. *c.* 36. *s.* 10., whether the prosecution be instituted according to sects. 5 and 6 of that act, or in the ordinary course.

AN indictment was preferred at the *Middlesex February* sessions, 1846, by a private individual against the defendants for keeping a common gaming house; and a true bill was found. The defendants, having given recognizances to try at the *March* sessions, obtained a certiorari, in vacation, to remove the indictment. The prosecutor took out a summons to shew cause, before *Cresswell J.* at chambers, why the

certiorari should not be quashed, as having issued in contravention of stat. 25 *G.* 2. *c.* 36. *s.* 10., and why a procedendo should not issue. Reference being made, on the hearing, to a case of *Regina* v. *Richardson and Fletcher* (after mentioned), the learned Judge adjourned the summons, in order that the opinion of this Court might be taken upon the application. In last *Easter* term the prosecutor obtained in this Court a rule to shew cause why the writ should not be quashed.

The affidavits in opposition to the rule stated that, in *November* 1844, one *Moses Jacobs* preferred an indictment against *Thomas Richardson* and *Mary Ann Fletcher* before the Grand inquest of this Court, for keeping a common bawdy house; that, in *January*, 1845, *Patteson* J., on summons, granted a certiorari at the instance of the defendants to remove the indictment into this Court; and that, afterwards, on summons to shew cause why the certiorari should not be quashed as contrary to the statute, and a procedendo issue, the learned Judge dismissed the summons, being of opinion that sect. 10 applied only to indictments preferred under sect. 5 of the same statute.

Jervis and *Willes* now shewed cause. Sect. 5 of stat. 25 *G.* 2. *c.* 36., for the purpose of encouraging prosecutions against keepers of disorderly houses, obliges the constable of any parish, on notice of such house given by any two inhabitants paying scot and bearing lot, to go before a justice, and there enter into recognizance to prosecute at the next sessions or assizes, the two inhabitants making oath before the justice that they believe the contents of the notice to be true, and being bound in recognizance to give material evidence. Sect. 10 en-

acts: "That no indictment which shall at any time after the said 1st day of *June*" (1752) "be preferred against any person for keeping a bawdy house, gaming house or other disorderly house, shall be removed by any writ of certiorari into any other court; but such indictment shall be heard, tried and finally determined, at the same general or quarter sessions or assizes, where such indictment shall have been preferred (unless the Court shall think proper, upon cause shewn, to adjourn the same) any such writ or allowance thereof notwithstanding." But the words "no indictment" there must mean no indictment under sect. 5, and must be read "no such indictment;" the rather, as the clause immediately preceding relates expressly to any "such" prosecution, clearly referring to those under sect. 5. If sect. 10 were construed without limit, every indictment found for keeping a disorderly house or gaming house would be triable at the same sessions or assizes, notwithstanding any right of traverse, however late the bill might come in. Sect. 6 provides that, when the constable has entered into recognizance, the party accused shall be bound over to appear and answer at the next sessions or assizes: the enactment of sect. 10, that the indictment shall be finally determined at the same sessions or assizes, is reasonable on the supposition that the defendant has been so bound over, but absurd if extended to cases within the ordinary practice, where a bill may be preferred without any previous notice to the defendant. The decision of *Patteson* J. in *Regina* v. *Richardson* is therefore well founded. *Rex* v. *Fox* (*a*) was cited in moving for this rule; but it

(*a*) 5 *Dowl. P. C.* 242.

does not appear that the indictment there was not preferred under sect. 5 of the statute: and it was admitted to be the practice understood at the Crown Office that indictments for keeping gaming houses might be removed at the instance of the prosecutor; which, however, would have been incorrect if sect. 10 had borne the strict construction now insisted upon. The principle of annexing to unqualified words in a statute the qualification which reason and the obvious intent require has been often recognized: among other instances are *Jones* v. *Smith* (*a*) and *Vallance* v. *Siddel* (*b*), in which latter case it was suggested that the words "any bill of exchange or promissory note," in stat. 3 & 4 *W.* 4. *c.* 98. *s.* 7., must mean any "such" bill &c.; and Lord *Denman* C. J. said: "Probably some restriction will be found inevitable when they require to be applied in a court of justice." [This Court ought not to be ousted of its controul, especially over prosecutions of the present description, without a clear expression of that intent by the legislature. The object of the statute was that, while the suppression of disorderly houses was ensured, prosecutions by improper persons might be discouraged: and all the enactments must be read with a reference to these purposes.

Sir *F. Kelly*, Solicitor General, and *Crompton*, contrà. Statutes must be construed literally, unless that construction leads to some palpable absurdity or inconvenience. Sect. 10 of stat. 25 *G.* 2. *c.* 36. is wholly

(*a*) 6 *Dowl. P. C.* 557, was cited: see *S. C.*, more fully, in 3 *M. & W.* 526.

(*b*) 6 *A & E.* 932.

unqualified. Sects. 5 and 6 make a special provision for prosecuting keepers of disorderly houses at the instance of two parishioners; and sect. 9 clearly refers to sect. 5; but the reference there is express, and the word "such" is used. And there are parts of the statute, as sect. 2, which relate to the punishing of this kind of offence in other modes than that given by sect. 5. Sect. 8 cannot have been meant to bear a construction limited by sect. 5. [*Patteson* J. I believe it has been acted upon as applying generally.] As to the difficulty, under sect. 10, from want of notice to the defendant in an ordinary prosecution, that clause enacts only that the indictment shall be tried at the next sessions or assizes, "unless the Court shall think proper, upon cause shewn, to adjourn the same." In a case of hardship this would of course be done. [*Patteson* J. It is to be on cause shewn: if the bill is preferred in the ordinary course, the party charged may not have the notice which would enable him to shew cause.] He could not be tried in his absence. The provision for trying at the same sessions or assizes must proceed on the supposition that both parties are before the Court; and that either the defendant or the prosecutor may shew cause if there has not been time to prepare for immediate trial. There is, then, no absurdity or inconvenience in giving a literal meaning to the words "no indictment" in sect. 10. The decision in *Regina* v. *Richardson* was only a ruling on summons. The granting of a certiorari at chambers is merely ex parte. [*Patteson* J. I granted it so in *Regina* v. *Richardson*; but then, on the application for a procedendo, the defendants persuaded me, whether rightly or not I do not know, that a procedendo ought not to issue. The

books of criminal practice all lay down that in prosecutions of this kind certiorari at the instance of the Crown is not taken away (*a*).] Those books, and *Rex* v. *Davies* (*b*), usually cited on the point, shew that that impression has prevailed in favour of the Crown. *Rex* v. *Fox* (*c*) is a decisive authority against the certiorari at the instance of defendants in general, unless it be assumed (for which there is no ground) that the prosecution there was instituted under sect. 5 of the statute. [*Patteson* J. After all, the indictment in cases under this statute is at common law, though the proceedings are regulated by the act.] The policy of the statute was to put down disorderly houses by facilitating and expediting prosecutions: taking away certiorari contributes to this end; and there is no ground for supposing a limit to this, more than to the other regulations having a like object. [*Patteson* J. Probably the latter part of sect. 10 was added by an oversight, the framer not considering that a defendant might be brought before the Court in the ordinary course, and without being first bound over.] Giving a rational construction to the words "upon cause shewn," no reasonable doubt can be raised on the language of that clause. [*Crompton* was stopped by the Court.]

Lord DENMAN C. J. We are of that opinion, and think the rule must be absolute.

PATTESON J. I was persuaded to refuse the procedendo in *Regina* v. *Richardson* by the words in the

(*a*) See 1 *Chitt. Crim. L.* 377. 2d ed.; *Archb. Pract. Cr. Off.* 156.; *Archb. Crim. Pl.* 636. 10th ed.; *Corner's Practice of the Crown Side*, &c. p. 51.

(*b*) 5 *T. R.* 626.

(*c*) 5 *Dowl. P. C.* 242.

latter part of sect. 10. I suppose the person who drew that clause forgot that an indictment might be preferred without putting the defendant under recognizance, or any of the other formalities required by sects. 5 and 6. It shows the carelessness with which these things are done. But the general object of the statute, to prevent delay and difficulty in prosecutions of this kind, is clear.

WILLIAMS J. concurred.

Rule absolute.

The QUEEN *against* The Inhabitants of the Parish of ST. MARTIN, NEW SARUM.

Saturday, June 6th.

A pauper gained a settlement in parish *J.* Afterwards, by act of parliament, *J.* was united, for all but ecclesiastical purposes, with parish *B.*, by the title of *The United Parishes of J. and B.*

Held, that the pauper was settled in the united parishes.

ON appeal against an order of two justices, whereby *Mary Ann Escott*, widow, and her five children, were removed from the parish of *St. Martin*, in the city and borough of *New Sarum*, to "the parish of *Glastonbury*," in *Somersetshire*, the sessions (*Michaelmas*, 1845) quashed the order, subject to the opinion of this Court on the following case.

Previously to the year 1834, and up to that period, the town of *Glastonbury* in the county of *Somerset* consisted of two distinct parishes, each maintaining its own poor, and known respectively as the parishes of *St. John the Baptist* and *St. Benedict.* On 22d *May* in that year, stat. 4 & 5 *W.* 4. *c.* xxiii. (*a*) was passed, for uniting

(*a*) Local and personal, public: "for uniting into one parish the parishes of *St. John the Baptist* and *St. Benedict* in the town of *Glastonbury* in the county of *Somerset.*"

the two parishes into one parish for all purposes whatsoever (except ecclesiastical matters), and that they should thenceforth be called, known and distinguished by the name of *The United parishes of St. John the Baptist and St. Benedict in the town of Glastonbury, in the county of Somerset.* The pauper, *Mary Ann Escott*, is an illegitimate child, and was born, in *February* 1813, in the parish of *St. John the Baptist, Glastonbury.* On 8th *June*, 1830, she married her late husband, *John Escott*, whose legal settlement at the time of his death, which happened on the 18th *January* last, was unknown. The pauper and her children having become chargeable to the parish of *St. Martin*, in which he resided, an order, dated 25th *June* 1845, was made by the borough justices for their removal to the parish of *St. John the Baptist, Glastonbury*, against which order an appeal was entered, and came on for hearing at the borough sessions in *October* last, when the above facts were admitted. The appellants, however, contended that, on the passing of the above mentioned act of parliament, the said parishes of *St. John* and *St. Benedict* became, and were thenceforth, united into one parish, and that therefore the settlement of the pauper, acquired by her by birth in the parish of *St. John, Glastonbury*, prior to the passing of that act, was lost and destroyed, and that in point of fact there was not, at the time of making the said order of removal, any such parish as the parish of *St. John the Baptist, Glastonbury.* The appellants having consented to waive all formal objections to the order of removal, it was agreed that the same should be quashed, subject to a special case for the opinion of the Court of Queen's Bench.

If the Court should think that, by the operation of

stat. 4 & 5 *W.* 4. *c.* xxiii., above cited, the settlement of the pauper, acquired previously to the passing of that act, was lost and destroyed, so as to prevent her being removable either to the parish of *St. John the Baptist* or to *The United parishes of St. John the Baptist and St. Benedict in the town of Glastonbury*, then the order of sessions was to be affirmed: if otherwise, then the order of sessions to be quashed, and the order of removal to be affirmed.

Kinglake Serjt. and *F. V. Lee*, in support of the order of sessions (*a*). The respondents, to maintain the order of removal, must shew, either that the pauper can be removed to the united "parish of *Glastonbury*," according to its designation in the order of removal, or that a pauper settled in the parish of *St. John* before the incorporating act can be removed, notwithstanding that act, to the parish of *St. John*. The latter is impossible, the parish no longer existing except for ecclesiastical purposes, and being, accordingly, not named in the order. The former would be a removal to a different parish from that in which the settlement was obtained. The true solution of the difficulty is that, when the act passed, settlements obtained antecedently in either parish were destroyed, the act being prospective only, and the result would be the same as where a place formerly extraparochial was made a township; *Rex* v. *Oakmere* (*b*); and as where a "parish" was divided, after a pauper's birth, into several townships; *Regina* v. *Tipton* (*c*). In this last case it was held that a

(*a*) The argument in support of the order of sessions was heard on *June* 3d in this term, and is reported by *H. Merivale*, Esq.

(*b*) 5 *B. & Ald.* 775. (*c*) 3 *Q. B.* 215.

settlement by birth in the workhouse of the original parish was lost altogether: and the ruling was adhered to in *Regina* v. *Hunnington* (*a*). *Rex* v. *Saighton-on-the-Hill* (*b*) is another instance of a settlement being extinguished by the destruction of the separate parochiality in respect of the maintenance of paupers. In *Rex* v. *Oswestry* (*c*) the decision, that a hundred, which was liable by prescription to the repair of bridges, continued so, notwithstanding the annexation to it of a township within time of legal memory, went upon the express words of the annexing statute.

Crowder (with whom was *Slade*), contrà. The cases establish that, where a district maintaining its own poor is divided into districts, each thenceforward maintaining its own poor separately, no one of such separate districts is chargeable in respect of a settlement in the original undivided district. Such are the cases arising out of the mandamus in the case of the parish of *Hales-Owen* (*d*); *Regina* v. *Tipton* (*e*), *Regina* v. *Hunnington* (*a*); and the similar case of *Regina* v. *Acton* (*g*). In such a case, to charge any one district would be manifestly unjust. *Regina* v. *Oakmere* (*h*) shews only that a district which becomes liable to maintain its own poor does not therefore become chargeable in respect of any bygone facts which would, before the change, have created a settlement. *Rex* v. *Saighton-on-the-Hill* (*b*) is

(*a*) 5 *Q. B.* 273.
(*b*) 2 *B. & Ald.* 162.
(*c*) 6 *M. & S.* 361. See *Regina* v. *New Sarum*, 7 *Q. B.* 941.
(*d*) See *Rex* v. *The Justices of Salop*, 3 *B. & Ad.* 910.; *Rex* v. *Oldbury*, 4 *A. & E.* 167.
(*e*) 3 *Q. B.* 215.
(*g*) 8 *Q. B.* 108.
(*h*) 5 *B. & Ald.* 775.

inapplicable: there a settlement became unavailing, because the place had no longer any capability of maintaining the poor, no buildings except public ones remaining; and this, it was held, did not revive an earlier settlement which had been extinguished by the later one. The present is the case, not of a separation by mandamus, but of the union of two parishes by act of parliament, which probably was obtained at the joint instance of the two. The whole new parish properly assumes the burthens before incumbent on either of the constituent old parishes; that is very different from selecting one portion as liable to a burthen previously incumbent on the whole. Here the parish officers of the whole are parish officers for each part; though the converse would not be true. (He was then stopped by the Court.)

Lord Denman C. J. The result of the cases arising upon the division of *Hales Owen* may perhaps be regretted: but we had not the power to create a settlement by relation. This is a case of another kind. The pauper is settled in one of two parishes, which are afterwards united by statute into one, for all except ecclesiastical purposes. The only question is, whether the statute sweeps away all antecedent settlements in each parish by uniting the two. Such a result might, indeed, be convenient enough to the two parishes: but I cannot think that any thing of the sort was intended by the Legislature when it sanctioned the union which the parishes desired to effect. We must consider that this parish is subject to all the vested liabilities of the two, in the absence of any direct enactment to the contrary. I think, therefore, that there is now a settlement in the

united parish in respect of the old settlement in one of the constituent parishes.

Patteson J. I am of the same opinion. I feel no difficulty as to the cases relied upon in support of the order of sessions. In those cases the Court was, in fact, asked to support an order of removal to a parish in which the pauper had never been settled. In *Regina* v. *Tipton* (*a*) one essential step was wanting: it could not be shewn that the appellant township had ever supported its own poor. In *Regina* v. *Hunnington* (*b*) there was the same difficulty; and even there my brother *Coleridge*, considering himself bound by *Regina* v. *Tipton* (*a*), said nevertheless that, if the matter were open, he should desire to hear it more fully argued: and I conceive that he felt a doubt as to the extent to which the mandamus affected the previous liability of the separate parts. But undoubtedly the decision of the Court went on the ground that no settlement had ever been gained in the appellant township: that is also the principle of *Rex* v. *Oakmere* (*c*). *Rex* v. *Oswestry* (*d*), to which Mr. *Lee* refers, is not altogether distinguishable: there the hundred was liable to a prescription; a township was added to it, within the time of legal memory, by act of parliament: and it was contended that this destroyed the prescription, inasmuch as the hundred, so increased, could not be immemorially liable. But the Court held that the hundred, which had been liable, still existed, and was liable still. That seems to shew that the annexation of another parish here

(*a*) 3 *Q. B.* 215.
(*b*) 5 *Q. B.* 273.
(*c*) 5 *B. & Ald.* 775.
(*d*) 6 *M. & S.* 361.

could make no difference in the settlement. This is conformable, too, with the policy of stat. 4 & 5 *W.* 4. *c.* 76., which permits the union of parishes for the purposes of settlement, but enacts that, in such a case, a settlement in one of the parishes shall be a settlement in the union; sect. 33: and so, by sect. 34, parishes may unite for the purpose of raising funds in common: but these provisions do not interfere with the right of other parishes to remove to any of the parishes of the Union in which such paupers were previously settled. In the present case the act merely says that the two parishes shall become one, not giving them even a new name, but calling them the united parishes. It is clear that there was no intention to destroy rights vested as against either parish.

WILLIAMS J. It would have been advantageous if those who framed this act had explained how the paupers were to be provided for. I think Mr. *Crowder* has properly described the effect of the act; and there is no case against him. In *Rex* v. *Oakmere* (*a*), *Rex* v. *Saighton-on-the-Hill* (*b*) and *Regina* v. *Tipton* (*c*) there was no settlement in any place as to which the question arose: here there was a settlement in the parish of *St. John the Baptist*, which has continued, whether the parish was united with another or not: for I can see no reason for supposing that the Legislature, by uniting the parishes, meant to destroy any settlement in either, or to relieve from liabilities previously existing.

Order of sessions quashed.

(*a*) 5 *B. & Ald.* 775. (*b*) 2 *B. & Ald.* 162.
(*c*) 3 *Q. B.* 215.

Volume IX.
1846.

Saturday, June 6th.

The QUEEN *against* The Inhabitants of WALBOTTLE.

Pauper executed a pit bond, by which he and others were hired from 5th *April* 1826 to 5th *April* 1827, to hew, work, &c. coals in a colliery, and to do such other work as might be necessary for the colliery, and be required by the owners, at the prices, and on the terms, conditions, &c. after mentioned. By clause 2 the owners were to allow the workmen during the whole period of the hiring so much work as would amount to 28*s.* a fortnight, but might, if they deemed it expedient at any time to work only nine days in a fortnight, *lay the pits off work* for the other days, allowing the men to earn 28*s.* each in the nine days; and, by clause 6, the owners might *lay the pits off work* for ten working days at *Christmas*, but the men were nevertheless *to continue, during such time and all other times that the pits should be laid off work, the servants of the owners,* and liable to be employed by them in such work as they should see fit. There was also, in clause 7, provision for a payment to the men if by accident to the engine, or other cause, a pit should be rendered unfit for working. Clause 8 provided that the men, unless prevented by sickness &c., *should do a full day's work on every working day and not leave their work until such day's work was finished,* to the extent of each man's ability, under certain penalties in case of default: and that the owners should be at liberty to require work from the men on the pay *Saturdays* as well as on every of the week days. By other clauses, the dwelling houses provided for the men were to form part of their wages, and to be delivered up on expiration &c. of the hiring; and the occupier of such house was to keep the glass of the windows in repair: and none of the parties hired was to keep any galloway, ass or dog.

Held an exceptive hiring, no control being reserved to the employers after performance of a full day's work; and, it being found, in a case stated by the sessions, that the stipulation for continuance of service when the pits should be *laid off work* applied only to the specific occasions mentioned in clauses 6 and 7, and not to the cessation after performance of a full day's work under clause 8.

ON appeal against an order of Justices removing *John Walker* from the township of *High Callerton* in the parish of *Ponteland* in *Northumberland* to the township of *Walbottle* in the parish of *Newburn* in the same county, the Sessions confirmed the order, subject to the opinion of this Court on a special case, the material parts of which were as follows.

The respondents at the trial relied upon a settlement "by hiring and service under an agreement usually called a pit bond, and containing, amongst others, the following provisions.

"Memorandum of agreement, made the 25th day of *March*, A. D. 1826, between *Joseph Lamb*, *William Potter* and *John C. Jobling*, Esqs. owners of *Walbottle* colliery

of the one part, and the several other persons, whose names or marks are hereunto subscribed, of the other part. The said owners do hereby retain and hire the said several other parties hereto from the 5th day of *April* next ensuing until the 5th day which will be in the year 1827, to hew, work, fill, drive and put coals and to do such other work as may be necessary for carrying on the said colliery, and as they shall be required or directed to do by the said owners, their executors, administrators or assigns, or their viewer or agents, at the respective rates and prices, and on the terms, conditions and stipulations, and subject to and under the penalties and forfeitures, hereinafter specified and declared."

"Second. The hewers are to be allowed during the whole period of their hiring, save for one fortnight at *Christmas* and in case of accident as provided for by the seventh condition, not less work than will yield to them, at the aforementioned rates, the sum of 28*s.* in each fortnight: but, if at any time the said owners shall deem it expedient for the said hereby hired parties to work no more than nine days in a fortnight, the said owners are hereby empowered to lay the pits off work for the other days, allowing the hewers to earn in such nine days not less than the aforesaid sum of 28*s.* each."

"Sixth. The said owners shall be at liberty to lay the pits off work, at or about *Christmas*, for any such time, not exceeding ten working days, as they may think proper; but the said parties hereby hired shall nevertheless continue during such time, and during all other times that the pits shall be laid off work, the servants of the said owners, subject to their orders and

directions, and liable to be employed by them in such work as they shall see fit.

"Seventh. That, if, by any accident happening to the engine of the said colliery, or from any other cause, a pit shall be rendered unfit for working, and the said parties hereby hired shall be laid idle for more than three successive days, 2*s.* 6*d.* per day shall thereafter be paid to such of the said parties as are hewers," &c. (specifying other allowances to workmen of other classes); "provided that they respectively work at any other labour offered them by the said owners, their executors" &c.: "and, in case such work is not provided for them, and in case they are permitted by the said owners, their executors," &c., "to find employment elsewhere, and that such employment may be had, then the hewers shall receive" &c. (specifying reduced allowances): "and, in the event of any of the said parties being, with the permission of the said owners, fully employed in any other colliery, no payment whatever shall be made to them during such employment.

"Eighth. That the said parties hereby hired shall (except when prevented by sickness or other sufficient or unavoidable cause) do and perform a full day's work on each and every working day, or such a quantity of work as shall be fairly deemed equal to a day's work, and shall not leave their work until such day's work or quantity of work is fully performed or finished to the extent of each man's ability; and, in default thereof, each of the said parties hereby hired and so making default shall for every such default forfeit and pay to the said owners, their executors, administrators or assigns, the sum of 2*s.* 6*d.* And it is understood and agreed that the said owners shall be at liberty, if they think fit,

to require the parties hereby hired to work on the pay *Saturdays* as well as on every of the week days."

"Twelfth. None of the said hereby hired parties shall keep either galloway, ass or dog; and each person to whom a dwelling house shall be provided as part of his wages shall keep in good repair the glass in the windows thereof, or pay the said owners for the repairs of the same."

"Fourteenth. It is also distinctly understood and agreed that the dwelling houses provided for any of the persons hereby hired or engaged are, and form part of, the wages of such persons, and, on the expiration of the said hiring, and in case any of them shall quit or be legally discharged from the employment hereby agreed upon, he or they shall immediately quit such dwelling house or dwelling houses; and, in case of neglect or refusal, such owners shall be at liberty, and he and they, their agents and servants, are hereby authorized and empowered to enter into and upon such dwelling houses, and remove and turn out of possession such workman or workmen, and his and their families, furniture and effects, without having recourse to any legal proceedings.

"Provided always, and it is hereby declared, that nothing herein contained shall extend, or be construed to extend, to alter, prejudice, lessen or otherwise affect the legal remedies and powers which by law belong to masters and servants in their respective relations to each other, or to magistrates having jurisdiction in case of dispute or difference between them."

This agreement was signed, among others, by the pauper, who was at that time unmarried and without child or children. In pursuance of the agreement, he entered into the service of the owners of the said col-

liery on the 5th of *April*, 1826, and remained with them the whole year, and resided during all that time in the appellant township. The men employed at the colliery, including the pauper, kept holiday for ten days or a fortnight at *Christmas*, which was the only time that the pit was laid off work during the year. The pitmen, including the pauper, occasionally worked on the pay *Saturdays;* but this took place very seldom. The pitmen left their daily work at different times, some of them working longer than others. The expression "the pits shall be laid off work" does not apply to the cessation of work on working days when all the men have left their work, or to pay *Saturdays* or *Sundays*, but applies only to the *Christmas* holidays, and to cases like those mentioned in the second and seventh clauses of the foregoing bond.

For the appellants, it was contended that the hiring and service of the pauper under the bond were not such a hiring and service for a year as would confer a settlement. If the Court should be of opinion that they were, the order was to be confirmed: but, if the Court should be of opinion in favour of the appellants, then the order was to be quashed.

Ingham in support of the order of sessions. This case falls within the principle of *Rex* v. *Byker* (*a*) and *Rex* v. *St. Helen's Auckland* (*b*). The relation of master and servant continued throughout the year. It cannot be said, as in *Rex* v. *Gateshead* (*c*) and in *Rex* v. *Cowpen* (*d*), that there was a period during which the workman was, by the agreement, not to be under the

(*a*) 2 *B.* & *C.* 114.
(*b*) 4 *B.* & *Ad.* 718.
(*c*) 2 *B.* & *C.* 117. note (*a*).
(*d*) 5 *A.* & *E.* 333.

master's controul. The contract begins with a hiring for a whole year; the eighth article, which stipulates for "a full day's work" on every working day, does not qualify the former engagement so as to make it exceptive. In *Rex* v. *Ossett cum Gawthorpe* (*a*) the agreement for five years was followed by a stipulation as to hours of working; but that was not held to exclude the master's right during any part of the year, so as to change the nature of the contract. In no case, except that of menial servants, is the servant expected to work at all times. In *Rex* v. *Byker* (*b*) the hiring was for a year, and the master stipulated to pay a certain sum "for every good and sufficient day's work, not exceeding fourteen hours." *Bayley* J., delivering the judgment of the Court, said: "We are of opinion, that the time was only mentioned as the measure of the wages; that the contract does not impose any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours." Here also the wages are measured by the time of working: no maximum is stated, as in *Rex* v. *Byker* (*b*); but the minimum is a full day's work; that is, as much as the extent of each man's ability permits in a day. The words do not impose a limit on the rights of the employers. Even when they lay the pits off work, as they reserve liberty to do, for ten days at a time, there is a stipulation (not found in *Rex* v. *Byker* (*b*)) that the parties hired shall "continue," during such time, the servants of the owners. It can hardly, then, have been under-

(*a*) 4 *B. & Ad.* 216. See *Regina* v. *Holbeck*, 4 *Q. B.* 590.
(*b*) 2 *B. & C.* 114.

stood that they should cease to be servants at the close of each day's work. As Lord *Ellenborough* said, in *Rex* v. *All Saints, Worcester* (*a*) (which was the case of a clerk in an agency house), "there is in every contract of hiring some implied exception of hours for relaxation, food, and rest." "The master here has a right to the service of the pauper at all times, but he does not require his services at any other hours than those mentioned: there is not any exception in the contract." In *Rex* v. *Cowpen* (*b*), where the hiring was held exceptive, there was an exclusion of pay *Saturdays;* and the same appears to have been the case in *Rex* v. *Gateshead* (*c*). Here the employers expressly retain a right to service on the pay *Saturdays.* In *Rex* v. *Birmingham* (*d*), which may be cited for the appellants, there was a direct stipulation that the servant was to work from six in the morning to seven in the evening, and might then make as much overwork as he chose. That excluded the master's controul after seven in the evening. *Rex* v. *Norton Bavant* (*e*), *Rex* v. *Edgmond* (*g*), *Rex* v. *Frome Selwood* (*h*) and *Rex* v. *Stoke-upon-Trent* (*i*) were cases of artisans engaging themselves to work at a trade for given portions of time: there was nothing which necessarily established a relation of master and servant beyond those times. Here the controul extends over every hour during the twelve months: the servant has a house as part of the recompense of his service to be given up when it expires, and in the meantime to be partly kept in repair: and he is forbidden to have certain animals.

(*a*) 1 *B. & Ald.* 322.
(*b*) 5 *A. & E.* 333.
(*c*) 2 *B. & C.* 117. note (*a*).
(*d*) 9 *B. & C.* 925.
(*e*) 3 *A. & E.* 161.
(*g*) 3 *B. & Ald.* 107.
(*h*) 1 *B. & Ad.* 207.
(*i*) 5 *Q. B.* 303.

The terms of the employment, therefore, continue binding, even when he is at home; and the employers are bound by them at that time, as well as during the hours of work. The case, therefore, is governed by the same principle as *Rex* v. *Ossett cum Gawthorpe* (*a*): there is a contract for an entire year; and the particular terms which follow regulate the performance, but create no exception.

Knowles and *Granger*, contrà. This case is undistinguishable from *Rex* v. *Gateshead* (*b*). There (as the decision is explained by *Denman* C. J. in *Rex* v. *St. Helen's Auckland* (*c*)) the pauper had not stipulated to be under the master's controul for the whole year, because he was exempt from that controul on every working day as soon as he had done the full day's work. Here the eighth clause is, in all material respects, similar to the stipulation in that case as to work on working days. After the full day's work had been completed the master could not, by application to a magistrate, compel the workman to do more or pay a forfeit. Although, therefore, the contract appears in the outset to be for a year, yet (as was observed in *Rex* v. *Cowpen* (*d*)) "the earlier part" "must be understood with reference to what follows;" and, "so limited, the hiring is certainly exceptive." Clause 6, which provides that, during the interval of ten days at *Christmas*, the parties hired shall continue servants, applies to that period only: if it is absurd that the provision should not extend to the over hours on ordinary days, the fault

(*a*) 4 *B.* & *Ad.* 216.
(*b*) 2 *B.* & *C.* 117. note (*a*).
(*c*) 4 *B.* & *Ad.* 724.
(*d*) 5 *A.* & *E.* 339.

is in the agreement itself. In *Rex* v. *Byker* (*a*), where the hiring was held not to be exceptive, there were no words authorising the servants to leave work after a certain number of hours: here that liberty is plainly implied. The same distinction extends to *Rex* v. *St. Helen's Auckland* (*b*); and there the servants bound themselves, on *February* 4th, 1815, "*to work constantly* at the said colliery until the said 4th day of *February* 1816, or to forfeit" &c. Further, in the present case, the eighth clause, by the express mention of "working day" and "week days," impliedly excepts *Sundays*, on the principle "*expressio unius*" &c. Again, when the masters think proper to employ the men only nine days in a fortnight, they are (by clause 2) at liberty to lay the pits off work for the remaining days, provided they allow the hewers to earn 28*s.* in the nine days. This does not merely fix a minimum of employment; for it leaves a number of days during which the owners are not obliged to furnish work at all, and consequently the men are not obliged to serve; otherwise the contract would not be mutual. It is not, however, necessary to insist upon this clause, which does not appear to have been acted upon. The sixth clause empowers the owners to lay the pits off work for ten working days at *Christmas*; and it is observed on the other side that the men are nevertheless to continue servants "during such time;" but that applies only to ten days, whereas, by clause 2, the owners may make a suspension at *Christmas*, as to the hewers at least, for a fortnight. The same remark applies to the words, in clause 6, "and during all other

(*a*) 2 *B.* & *C.* 114.

(*b*) 4 *B.* & *Ad.* 718.

times that the pits shall be laid off work," which refer only to the cases of accident mentioned in clauses 2 and 7. The power given by the eighth clause to require work on pay *Saturdays* implies that they are not otherwise within the agreement: and, if that be so, the mere giving of such an option to the masters will not make that an agreement for a year which is not so in its first formation. [Lord *Denman* C. J. That stipulation does not seem to be the creation of a power. *Patteson* J. It is the exclusion of a conclusion as to those *Saturdays*.] The men would not be bound to work on the pay *Saturdays* without notice; then the hiring, with reference to these days, is exceptive, on the principle, laid down by this Court in *Rex* v. *Byker* (*a*), that "an exceptive hiring is one by which the relation of master and servant will not subsist for the whole year, unless some further arrangement is entered into." As to the dwelling houses, the argument on the other side is, in effect, that the service continues beyond the working hours on each day, because the employers could not turn the men out of the houses after those hours; but the occupation of the houses is matter of distinct agreement, which expressly makes it determinable only on the determination of the hiring. The stipulation as to keeping animals is merely a part of the agreement as to dwelling, and is no condition of the service. As to the argument that a clear hiring for a year is not to be qualified by subsequent regulations made, as it is said, merely to measure the wages, the hiring for a year in this case is not clear and unqualified. In *Rex* v. *St. Helen's Auckland* (*b*) the pitmen bound

(*a*) 2 *B. & C.* 120. (*b*) 4 *B. & Ad.* 718.

themselves by their agreement, expressly, to work from the day of the date thereof (*February* 4th, 1815) to the 4th of *February*, 1816, in the manner, and at the prices, specified: in *Rex* v. *Byker* (*a*) the form was equally direct. But here the agreement is to work from the 5th of *April* until &c., as they shall be required &c, "at the respective rates and prices, *and on the terms, conditions, and stipulations*, and subject to and under the penalties and forfeitures, hereinafter specified:" so that all the terms and conditions are made part of the primary contract. The same observation applies to *Rex* v. *Cowpen* (*b*), where the hiring was held exceptive, and where the clause as to performance of a full day's work was nearly the same, down to the imposition of a forfeiture, as the eighth clause in the present case.

Lord DENMAN C. J. *Rex* v. *Gateshead* (*c*) must decide this case, unless the sixth clause has the effect of making the men servants to the proprietors of the colliery at all times. At first it appears to have that operation. But the stipulation on behalf of the proprietors is for "liberty to lay the pits off work, at or about *Christmas*, for any such time, not exceeding ten working days, as they may think proper:" then it is added that the men "shall nevertheless continue during such time, and during all other times that the pits shall be laid off work, the servants of the said owners." One is at first disposed to take it for granted that all the year must be made up of time during which the pits are laid off work, and time during which the men are working. But it is found that on ordinary days the pits are not

(*a*) 2 *B.* & *C.* 114. (*b*) 5 *A.* & *E.* 33?

"laid off;" and therefore there is such an exception as prevailed in *Rex* v. *Gateshead* (*a*).

PATTESON J. In *Rex* v. *Byker* (*b*) *Bayley* J. said that, "if by the bargain days or hours are excluded from the service, that is an exceptive hiring:" but the Court held that, in that case, the time "not exceeding fourteen hours" was mentioned only as the measure of the wages, and the contract did not impose any limit upon what might reasonably be required by the master. The contrary was decided in *Rex* v. *Gateshead* (*a*), where the stipulations as to work were the same as those of clause 8 in the present agreement: and that difference of decisions is explained by *Denman* C. J. and *Parke* J. in *Rex* v. *St. Helen's Auckland* (*c*). *Parke* J. says there: "In the first of those cases" (*Rex* v. *Gateshead* (*a*)) "there was a stipulation that each man should, on each working day, do a full day's work, and that he should not leave the pit until that quantity of work was completed, and that, on default thereof, he should forfeit 2*s.* 6*d.* It was therefore stipulated, by implication, that the men were not to be under the controul of the master on days which were not working days, nor on any day as soon as a full day's work was completed." Here, if the words are the same in effect, there must be the same construction. And *Rex* v. *Gateshead* (*a*) is supported by *Rex* v. *Cowpen* (*d*). Then the only question is whether, in this respect, the sixth clause controuls the other part of the agreement, so that, after a full day's work, the servant was not completely at liberty. But that clause provides for the continuance of service only

(*a*) 2 *B.* & *C.* 117. note (*a*).
(*b*) 2 *B.* & *C.* 120.
(*c*) 4 *B.* & *Ad.* 724, 726.
(*d*) 5 *A.* & *E.* 333.

when the pits are "laid off work;" and the ending of a full day's work is not a laying off: therefore there is no distinction between this case and *Rex* v. *Gateshead* (*a*). The stipulation against keeping a galloway, ass or dog does not bear upon this question, and cannot controul the implication resulting from the words of the other clauses.

Williams J. If any time be excepted under this contract, it is immaterial how great a number of hours the servant may be bound to work. I agree that nothing distinguishes this case from *Rex* v. *Gateshead* (*a*), unless it be the sixth clause. The decision there, as explained in *Rex* v. *St. Helen's Auckland* (*b*), turned upon a clause which was the same to all intents and purposes with the eighth in the present agreement, by which a certain amount of work is to be done, under penalty in case of default, but, when it is done, nothing in the contract gives the employers any further controul during the day. That constitutes an exception. Clause 6 appears at first to remove this; but it applies only to the event of the pits being "laid off work," and not to the whole proceedings under the contract.

Order of sessions quashed.

(*a*) 2 *B.* & *C.* 117. note (*a*). (*b*) 4 *B.* & *Ad.* 724. 726.

Queen's Bench.
1846.

The QUEEN *against* The Churchwardens and Overseers of the Parish of AYLESBURY WITH WALTON.

Saturday, June 6th.

ON appeal by the churchwardens and overseers of the poor of the parish of *Aylesbury with Walton*, in the county of *Buckingham*, against the county rate made 8th *April*, 1845, the sessions (1st *July*, 1845) confirmed the rate, subject to the opinion of this Court upon a case substantially as follows.

By a statute passed in 33 *G.* 3. (*a*) certain persons therein named were incorporated by the style of *The Company of Proprietors of The Grand Junction Canal*, and thereby empowered to make a certain navigation commonly known by the name of *The Grand Junction*

Stat. 34 *G.* 3. *c.* 24. enacted that a canal Company should be rated to all parliamentary and parochial taxes and assessments for its lands and buildings, in the same proportion as other lands and buildings lying near should be rated, and as the lands and buildings of the Company would be rateable if they were the property of individuals in their natural capacity.

Held that *A.*, a parish in *Buckinghamshire*, was to be assessed to the county rate on an estimate in which the Company's lands and buildings were assessed as directed by the statute. For that,

Under stat. 12 *G.* 2. *c.* 29., the county rate was to be paid out of the poor rate of the several parishes, and was therefore a parochial tax.

And that this was not altered by stat. 55 *G.* 3. *c.* 51., stat. 56 *G.* 3. *c.* 49., or stat. 7 & 8 *Vict.* *c.* 33.

Nor by stat. 54 *G.* 3. *c.* ciii. (local and personal public), which enacts that the Justices of *Buckinghamshire*, in quarter sessions, shall assess to the county rate of *Buckinghamshire* every parish, township, hamlet, liberty, precinct and place, in the county, rateably, and in due proportions, according to the annual rent or value of all estates within such parish, township, &c. respectively; and which requires returns to be made to the Justices (when they deem it necessary) of the total amount of such rent or value by the churchwardens and overseers of the several parishes, townships, &c., and makes provision for the case of any parish, township, &c., where no poor rate is laid, and for cases where it may be oppressive to parishes, townships, &c., that the county rate should be paid out of the poor rate.

(*a*) Stat. 33 *G.* 3. *c.* 80. "For making and maintaining a navigable canal from the *Oxford* canal navigation, at *Braunston*, in the county of *Northampton*, to join the river *Thames* at or near *Brentford*, in the county of *Middlesex*, and also certain collateral cuts from the said intended canal."

Canal: and, by another statute, passed in the following year (34 *G.* 3. *c.* 24.) (*a*), the Company were empowered to make certain navigable cuts to *Aylesbury* and other places in the county of *Buckingham*, to communicate with the said Grand Junction Canal. By the 19th section of the last mentioned statute it was enacted, "That the said Company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments, for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the said Company of proprietors, in pursuance of the said recited act (*b*) and this act, in the same proportion as other lands, grounds, and buildings, lying near the same are or shall be rated, and as the same lands, grounds, and buildings, so purchased or taken, or to be purchased or taken, and erected, would be rateable in case the same were the property of individuals in their natural capacity."

Under the powers of the last mentioned act, *The Grand Junction Canal Company* purchased certain land in the parish of *Aylesbury with Walton*, which now forms a part of the said *Aylesbury* cut, with wharfs and buildings adjoining thereto, and for which the Company are rated to the relief of the poor.

At the quarter sessions held at *Aylesbury*, for the county of *Buckingham*, the Justices, by virtue of the powers granted to them by the several statutes 12 *G.* 2.

(*a*) "For making certain navigable cuts from the towns of *Buckingham*, *Aylesbury*, and *Wendover*, in the county of *Buckingham*, to communicate with the Grand Junction Navigation, authorised to be made by an act of the last session of parliament; and for amending the said act."

(*b*) 33 *G.* 3. *c.* 80.

c. 29., 54 *G.* 3. *c.* ciii. (local and personal, public) (*a*), 55 *G.* 3. *c.* 51., 56 *G.* 3. *c.* 49., and 7 & 8 *Vict. c.* 33., or some or one of such acts, made a general county rate,

(*a*) 54 *G.* 3. *c.* ciii. "For making a fair and equal county rate for the county of *Buckingham*." (Printed in full in the Statutes at large.)

Sect. 1. "Whereas the assessments by which the county rates of the county of *Buckingham* are collected, are become very disproportionate and unequal, and it is therefore expedient that power and authority should be given to the justices of the peace for the said county of *Buckingham*, in their general quarter sessions assembled, to make a fair and equal county rate for the said county, and for that purpose to assess and tax rateably, and in due proportions, all and every the parishes, townships, hamlets, liberties, precincts and places, within the said county, according to the annual rent or value of all estates therein, for and towards the same, with powers for such justices to collect and enforce the payment of such rate; may it therefore please" &c., "and be it enacted," "that, from and after the passing of this act, the justices of the peace for the said county of *Buckingham*, in their general quarter sessions assembled, or at any adjournment thereof, shall have full power and authority, and they are hereby required to assess and tax to the county rate every parish, township, hamlet, liberty, precinct and place, within the said county, rateably, and in due proportions, according to the annual rent or value of all estates within such parish, township, hamlet, liberty, precinct and place respectively, in manner hereinafter mentioned."

Sect. 2. "And, in order the better to enable the justices" &c. "to assess and tax rateably, and in due proportions, every such parish, township," &c. (as before), "within the said county, be it further enacted, that the clerks to the respective commissioners, and also the inspectors, surveyors, assessors and other persons acting within the said county of *Buckingham*, in the execution of an act" &c. (Income Tax Act, 46 *G.* 3. *c.* 65.), shall, on any order, warrant or notice of two or more justices &c., in quarter sessions, return "the total amount of the annual rent or value of all estates within each and every parish, township," &c., within the county, assessed or liable to the duty under Schedule (A) of the last mentioned act.

Sect. enacts, That, after the determination of stat. 46 *G.* 3. *c.* 65., "it shall and may be lawful for the said justices" &c., "and they are hereby required when and so often as they shall deem it necessary, to cause such returns of the total amount of the annual rent or value of all estates within each and every parish, township," &c. (as before) "within the said county, as hereinbefore are mentioned, to be made by the churchwardens and overseers of the poor of the several parishes, townships," &c. (as before), "within the said county, in pursuance of such

wherein the parish of *Aylesbury with Walton* was assessed at 18,247*l.*, such sum being for the purpose of this appeal admitted to be the fair proportion of the

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order, warrant or notice, as before mentioned" (sect. 2), "or to cause and procure such returns to be made by any other ways and means as the said justices shall deem necessary or expedient."

Sects. 4, 5, 6, contain regulations as to the time of making the assessment, and to penalties in case of neglect.

Sect. 7 empowers and requires the justices, when, from the default &c. of the clerks, &c., overseers, &c., "a return as aforesaid, for any parish, township," &c. (as before), "shall not be made within the time before limited for the making thereof," "to rate and assess each and every the parish, township," &c., respecting which the default has been made, "for and towards the said county rate, according to such estimate of the just and fair annual rent or value of the estates within such parish, township," &c., "respectively, as the said justices shall be able to procure, by any of the ways and means hereinbefore directed, or by such other ways and means as to the said justices shall seem reasonable and proper."

Sect. 8 enacts: "that in any parish, township," &c. (as before), in the county, "where no rate is or shall be made and collected for the relief of the poor, it shall and may be lawful to and for the justices of the peace for the said county, in their general quarter sessions assembled, to order and direct the sum of money which shall from time to time be assessed as or for the county rate upon such parish, township," &c., "to be rated and levied on the inhabitant or inhabitants, or occupier or occupiers of lands therein, by such one or more inhabitant or inhabitants, or occupier or occupiers (to whom the chief constable of the hundred or division shall give the notice hereinafter mentioned for payment of such rate), in such and the same manner as any rate for the relief of the poor is by law directed to be rated or levied; which sum so rated and levied shall be paid by such one or more inhabitant or occupier, or inhabitants or occupiers, to the chief constable of the hundred or division wherein such parish, township," &c., "doth lie, within the space of twenty one days after demand thereof made in writing," &c.: then follow details as to demand; powers of distress and sale; and provisions for enabling such inhabitants or occupiers to recover the sum paid by a rate on the parish &c.

Sect. 9. "Whereas it may be inconvenient and oppressive to many parishes, townships," &c. (as before), "in the said county of *Buckingham*, that the sum of money which shall be assessed as or for the county rate under this act should be paid out of any rate made for the relief

county rate assessable upon the parish, according to the full and fair annual value of the messuages, lands, tenements and hereditaments in the said parish. The said cuts, wharfs and buildings occupied by *The Grand Junction Canal Company* are assessed in the said county rate at the sum of 1050*l.*, being 800*l.* more than the said cut, wharfs and buildings are now assessed to the poor rate, and 800*l.* more than the said cut, wharfs and buildings would have been assessed at had the same respectively remained or been the property of individuals in their natural capacity, possessing no artificial value.

If the Court of Queen's Bench should be of opinion that the said property of *The Grand Junction Canal Company* was not protected by stat. 34 *G.* 3. *c.* 24., above referred to, and was liable to be rated to the county rate at its improved value, the said sum of 18,247*l.* on the parish was to stand confirmed, otherwise to be reduced to 17,447*l.*

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of the poor of such parish, township," &c.; "be it therefore enacted, that it shall and may be lawful to and for the justices of the peace for the said county, at their general quarter sessions assembled, if they shall think convenient, to order the sum of money directed to be assessed as or for the county rate on any parish, township," &c., "to be paid by and levied on the churchwardens, overseers of the poor or petty constables, of or for any such parish, township," &c., "and to be reimbursed in such manner as the same is herein directed to be paid and levied in cases where no rate is made for the relief of the poor; any thing herein contained, or any law, usage or custom to the contrary notwithstanding."

Sect. 12 enacts: "That all the powers and authorities in and by an act passed" &c. (12 *G.* 2. *c.* 29.), "and also so much of another act passed" &c. (13 *G.* 2. *c.* 18.) "as relates to county rates, shall be and continue in full force and effect (except where altered by this act), with respect to the said county of *Buckingham*, and that all such powers and authorities shall be used and exercised in the execution of this act."

M. Chambers and *T. Sanders*, in support of the order of sessions. First, if stat. 34 *G.* 3. *c.* 24. *s.* 19. be applicable to county rates, it is repealed, so far as the principle of rating is concerned, by later statutes. Sect. 1 of the *Buckinghamshire* Act, 54 *G.* 3. *c.* ciii., enacts that the county rate shall be assessed in every parish, "in due proportions, according to the annual rent or value of all estates within such parish." By sect. 1 of the general act 55 *G.* 3. *c.* 51., the sessions, for the purpose of a fair and equal county rate, are "to assess and tax every parish" according to a pound rate "of the full and fair annual value of the messuages, lands, tenements and hereditaments, rateable to the relief of the poor therein; any law or statute to the contrary thereof notwithstanding": and sect. 2 requires that returns be made "of the total amount of the full and fair annual value of the several estates and rateable property within the parish," "charged or assessed to the poor's rate at the time of making such return, or liable so to be," "without regard nevertheless to the actual amounts or sums assessed on the property therein, save and except in such parishes, townships or places only, where such property is assessed to the full and fair estimated annual productive value." If no return be made, the justices are themselves to ascertain the annual value; sect. 6. In this case the full value has been properly taken. Sect. 21 authorises counties, for which particular acts have been passed, to adopt the provisions of this act.

Secondly, the county rate is not included in the words of stat. 34 *G.* 3. *c.* 24. *s.* 19., "parliamentary and parochial taxes and assessments." The word "parliamentary" cannot mean every tax imposed under

he authority of Parliament: that would include all taxes, and would render the word "parochial" superfluous. The word "parliamentary" refers only to such taxes as are directly imposed by parliament, excluding, for instance, a sewers' rate; *Palmer* v. *Earith* (*a*), where the Court distinguished *Waller* v. *Andrews* (*b*), and *Alderson* B. said that a county rate was not a parliamentary tax. *Brewster* v. *Kitchel* (*c*) and *Baker* v. *Greenhill* (*d*) confirm this view. Nor is the county rate a "parochial" tax. That term comprehends such taxes as are laid only on particular parishes; and a clause like that now in question was properly applied to a poor rate in *Rex* v. *The Grand Junction Canal Company* (*e*). But the county rate is laid on the whole county and for county purposes; though, by stat. 12 *G.* 2. *c.* 29. and later acts, it is raised by the several parishes. If there be any doubt on this point, that interpretation will be adopted which least tends to impose unequal public burthens; *Barrett* v. *The Stockton and Darlington Railway Company* (*g*), *Gildart* v. *Gladstone* (*h*). Where exemptions from general taxes have been allowed, the words have been express, as in *Rex* v. *Toms* (*i*), *Chatfield* v. *Ruston* (*k*), *Rex* v. *Wistow* (*l*), per *Williams* J.

Sir *F. Kelly*, Solicitor General (with whom was *Gurdon*), contrà. First, stat. 54 *G.* 3. *c.* ciii. *s.* 1. has

(*a*) 14 *M.* & *W.* 428.
(*b*) 3 *M.* & *W.* 312.
(*c*) 2 *Salk.* 615.
(*d*) 3 *Q. B.* 148.
(*e*) 1 *B.* & *Ald.* 289.
(*g*) 2 *M.* & *G.* 134. 165.
(*h*) 11 *East*, 675. 685.
(*i*) 1 *Doug.* 401.
(*k*) 3 *B.* & *C.* 863.
(*l*) 5 *A.* & *E.* 250. 261.

no reference to the rateability inter se of the several occupiers in the same parish: it regulates only the proportion in which the different parishes are to contribute to the county rate. The general principle of leaving the proportion of the parish to be raised out of the poor rate is left untouched. The act (*s.* 12.) incorporates stat. 12 *G.* 2. *c.* 29. and stat. 13 *G.* 2. *c.* 18. *s.* 7. so far as relates to the county rates. Now sect. 2 of stat. 12 *G.* 2. *c.* 29. makes the county rate leviable out of the poor rate only, if there be one; and, if there be not, it is (by *s.* 3.) to be levied from the parish in the same way as a poor rate. So in stat. 7 & 8 *Vict. c.* 33. the provisions for collecting the county rate, in sects. 1 and 2, contemplate only the raising it by a poor rate. Stat. 8 & 9 *Vict. c.* 111., passed after this order of sessions, shews that the same general principle is adhered to; as, for instance, in sects. 5, 6. The provisions in the other statutes referred to, requiring an equal assessment, were made to prevent parishes from evading the contribution of their due proportion to the county rate by rating themselves internally below the rack rent: these provisions have, so far, become unimportant since stat. 6 & 7 *W.* 4. *c.* 96., which requires the poor rate to be laid on at the full value: it is, however, material to observe that the act last mentioned contains a proviso, sect. 1, that the principles upon which different kinds of hereditaments were liable to be rated should not be altered.

Secondly, the county rate is properly a parochial tax. The rate, as has been shewn, is raised only by means, and from the produce, of a poor rate, which is admitted to be a parochial tax. (He was stopped by the Court.)

Lord Denman C. J. The poor rate is the fund which raises, in the different parishes, the county rate. We must therefore hold that the mode in which this property is to contribute to the county rate, such contribution being made through the poor rate, is to be calculated on the principle laid down in sect. 19 of stat. 34 *G.* 3. *c.* 24. Possibly, if the words of stat. 54 *G.* 3. *c.* ciii. *s.* 1. were taken by themselves, they might appear sufficiently general to authorise the overseers to assess on the ordinary principle. But the object of that act clearly was only to secure a proportional contribution from the different parishes: it does not interfere with the mode in which particular individuals are rated in the several parishes; that is left to the principle of estimation prevailing within the parish. Then, as to the other point, a case (*a*) has been referred to, in which this Court held that, where lands were liable ratione tenuræ to repair a bridge, and statutes, reciting that liability, enacted that, on default by the landowner, trustees created and empowered by one of the statutes should repair, and recover against the owners, the liability for such repair did not become a parliamentary tax, and therefore a tenant of the landowner, who had covenanted to pay the rent clear of parliamentary and parochial taxes, might recover from the landowner the cost of repairs done by the trustees in the landowner's default, and for which the tenant had been compelled to pay. But here the question is whether the county rate be not raised by a parochial tax, by virtue of the enactment which imposed it in the first instance: and we clearly must hold it to be so.

(*a*) *Baker* v. *Greenhill*, 3 *Q. B.* 148.

PATTESON J. Stat. 12 *G.* 2. *c.* 29. *s.* 2. directs that the county rate be paid out of the poor rate, with an exception (the reason of which I do not understand) as to eight counties in the north. Now, if the sum here in dispute is to be added to the assessment of the parish, all the parishioners will have to pay their share of such addition; it will not all come from the Company: nor do I see how it will be possible to get the whole of it from them, except by a special rate for the county rate alone; and for that I can find no authority. Sect. 12 of stat. 55 *G.* 3. *c.* 51. provides for compelling the overseers to levy the sum required for the county rate: and that clearly is to be done by including such sum in the poor rate. Sect. 13 (*a*) provides for the particular inconvenience which will arise in the case of places not liable to a separate poor rate; and the *Buckinghamshire* act, stat. 54 *G.* 3. *c.* ciii. *s.* 8., has a similar provision. All this shews that there was no intention to depart in this respect from the principle of stat. 12. *G.* 2. *c.* 29., and that the county rate was still to be paid out of the poor rate.

WILLIAMS J. It seems to me that sect. 12 of stat. 55 *G.* 3. *c.* 51. is referable to the mode of raising the money under the ordinary power of the overseer to levy an equal rate on all property rateable to the relief of the poor, and that no new mode of assessment for the county rate, per se, was contemplated. Stat. 12 *G.* 2. *c.* 29. *s.* 2. expressly provides that the contribution to the county rate is to come out of the poor rate.

Rate reduced.

(*a*) Referring to sects. 7, 8.

HAMILTON *against* The QUEEN.

Saturday, June 6th.

(In Error.)

ARTHUR ROWAN HAMILTON was indicted at the Central Criminal Court.

The first count charged that he, contriving and intending to cheat and defraud one *James Wood*, Esquire, of his moneys, on the 27th day of *March* in &c. (8 *Victoria*), with force &c., at the parish &c., and within the jurisdiction &c., unlawfully, knowingly and designedly, did falsely pretend to the said *J. Wood* &c. A false pretence, and an obtaining of money thereby, were then charged.

2nd count. That the said *A. R. Hamilton*, contriving and intending to cheat and defraud the said *James Wood*, to wit on the day and year aforesaid, at the parish &c., and within the jurisdiction &c., unlawfully, knowingly and designedly, did falsely pretend to the said *J. Wood* that he, the said *A. R. Hamilton*, then was a captain in her Majesty's 5th regiment of Dragoon

An indictment, under stat. 7 & 8 *G.* 4. *c.* 29. *s.* 53., charged that defendant, contriving and intending to cheat *W.*, on a day named, unlawfully, knowingly &c., did falsely pretend to *W.* that he, defendant, *then* was a captain in Her Majesty's 5th regiment of Dragoons, by means of which false pretence defendant did, then and there, unlawfully, knowingly &c., obtain of *W.* a valuable security, to wit an order for the payment of 500*l.*, of the value of 500*l.*, the property of *W.*, with intent then and there to cheat *W.* of the same: whereas in truth defendant was not, *at the time of making such false pretence*, a captain &c., and defendant, at the time of making such false pretence, well knew that he was not a captain &c. Held a good indictment, on error after conviction and judgment. For that

It was not necessary to allege more precisely that defendant made the particular pretence with the intent of obtaining the security:

Nor how the particular pretence was calculated to effect, or had effected, the obtaining:

And the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain &c. at the time of his making such pretence, which was the fact denied.

And it was unnecessary to aver expressly that the security was unsatisfied, at any rate since stat. 7 *G.* 4. *c.* 64. *s.* 21., the objection being taken after verdict, and the indictment following the words of the statute creating the offence.

Guards: by means of which said last mentioned false pretence the said *A. R. Hamilton* did then and there, unlawfully, knowingly and designedly, obtain, of and from the said *J. Wood*, a certain valuable security, to wit an order for the payment of the sum of 500*l.* of lawful money &c., and of the value of 500*l.*, the property of the said *J. Wood*, with intent then and there to cheat and defraud him, the said *J. Wood*, of the same: whereas, in truth and in fact, the said *A. R. Hamilton* was not, at the time of making such last mentioned false pretence as aforesaid, a captain in her said Majesty's said regiment; and the said *A. R. Hamilton*, at the time of making such last mentioned false pretence as aforesaid, well knew that he was not a captain in her said Majesty's said regiment. To the great damage &c., to the evil example &c., against the peace &c., and against the form of the statute in such case &c.

On the trial, at the *October* Sessions, 1845, the defendant was acquitted on the first count, and found Guilty on the second: and he was sentenced to be transported for seven years.

Error on the judgment was brought in this Court.

Ballantine, for the plaintiff in error. First, the second count is bad for not shewing that the alleged false pretence was made with intent to obtain the security. Sect. 53 of stat. 7 & 8 *G.* 4. *c.* 29. enacts "that if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanour." Stat. 30 *G.* 2. *c.* 24. *s.* 1. was, in this respect, similar. It might well happen that

a party made a false pretence, the result of which was his gaining an advantage which he did not contemplate; as if he made a false representation in order to obtain an office, but the party to whom he applied, instead of giving him the office, relieved him by a gift in money: yet this would not be an offence within the statute. Therefore the "intent to defraud" of "the same" must refer to the pretence as well as to the obtaining. The crime is fully defined by *Buller* J. in *Young* v. *The King* (*a*). "The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient; but some pretence must be used, and that pretence false: and the intent is necessary to constitute the crime. If the intent be made out, *and the false pretence used in order to effect it*, it brings the case within this statute." In *Rex* v. *Wakeling* (*b*) a pauper falsely told the overseer, with the view of being excused from working, that he had no shoes; and the overseer, believing the falsehood, gave him shoes: and it was held by the Judges that the case was not within stat. 30 *G.* 2. *c.* 24. *s.* 1. Secondly: the count ought to have shewn how the false pretence was calculated to effect the obtaining. Where the pretence is such that it at once appears how the pretence operated on the mind of the party defrauded, it is enough: but where, as in this case, no such connection is apparent, but only that such an effect might possibly be produced, there should be introductory averments to shew the relevancy. In *Young* v. *The King* (*a*) the connection sufficiently appeared. *Witchell's Case* (*c*),

(*a*) 3 *T. R.* 98. 104.
(*b*) *Russ. & R.* 504.
(*c*) 2 *East's Pl. Cr.* 830.

Rex v. *Airey* (*a*), *Rex* v. *Perrott* (*b*), are instances where the pretence obviously would effect the obtaining. But, where, for instance, the obtaining is effected by using the name of a customer of the party defrauded, there is always in the indictment an introductory averment that the person named was such customer. Thirdly, it ought to have been shewn that in fact the particular pretence did induce the party defrauded to give the security. The averments ought not to be less precise than in an indictment for perjury before stat. 23 G. 2. c. 11. The two are put on the same footing by Lord *Ellenborough* in *Rex* v. *Perrott* (*b*). As, therefore, in an indictment for perjury it is necessary to shew that the fact falsely sworn to was material to the question at issue, so here it is necessary to shew that the false pretence was that which effected the obtaining. [*Patteson* J. We cannot say that there was any other pretence than that by means of which it is alleged that the security was obtained.] On this indictment, nothing is shewn but a naked lie. A similar objection appears to have prevailed in *Regina* v. *Tully* (*c*): and the Judges held a conviction wrong, to which the same objection was made, in *Rex* v. *Reed* (*d*). [Lord *Denman* C. J. I do not think that case came, as the report states, before the Judges. *Patteson* J. It is not usual for the Judges to consider alleged defects which appear on the face of the indictment and are therefore ground for a writ of error.] *Regina* v. *Wickham* (*e*), though not directly in point, illustrates the principle now contended for. There the want of connection between a false pretence

(*a*) 2 *East's Pl. Cr.* 831.
(*b*) 2 *M. & S.* 379.
(*c*) 9 *C. & P.* 227.
(*d*) 7 *C. & P.* 848.
(*e*) 10 *A. & E.* 34.

and the effecting the object was held to make the indictment bad, so far as that pretence went. Fourthly, the falsehood of the pretence is not properly made to appear. *Rex* v. *Perrott* (*a*) shews that it is not sufficient simply to state that the party charged falsely pretended, by means of which false pretence he obtained. The question therefore is, whether the words in which the pretence is here specifically negatived be sufficient. The pretence is that the defendant "then" was a captain &c., that is, on the day and year aforesaid, 27th *March*, 8 *Victoria*: but the subsequent allegation is that he was not so "at the time of making such last mentioned false pretence." Now the two are compatible. He might have been what he alleged at the early part of the day, but have ceased to be so before he made the supposed false pretence; and, in that case, if he only pretended that he, at some time in the day, was so, the pretence would not be false. The ambiguity of the word "then" appears from *Stead* v. *Poyer* (*b*). Fifthly, the count ought to have shewn that the security was unsatisfied. The words in sect. 53 of stat. 7 & 8 *G.* 4. *c.* 29. are indeed "valuable security:" but the question is whether it is enough to follow the general words without shewing what the facts are that bring the case within the words. A security, if satisfied, would not be "valuable." Sect. 5 of the same statute, which punishes the stealing of valuable securities, has the words "remaining unsatisfied:" it may be assumed that in the two sections the legislature was referring to securities of the same kind.

(*a*) 2 *M. & S.* 379. (*b*) 1 *C. B.* 782.

C. Clark, contrà. The first three objections involve merely matter of evidence. The count here could be satisfied only by shewing that the pretence did operate in effecting the fraud, and that this was the intention of the defendant. The pretence is here as closely connected with the obtaining as in *Rex* v. *Freeth* (*a*) where the indictment was sustained, or as in *Rex* v. *Crossley* (*b*) where no such objection was made. One pretence only is mentioned: and it is alleged that the goods were obtained by means of that. [Lord *Denman* C. J. What do you say as to the want of averment that the security was unsatisfied?] In *Regina* v. *Blake* (*c*) it was held not necessary to describe the goods. [Lord *Denman* C. J. That was an indictment for conspiring to carry away goods without payment of duty: the gist was the conspiracy: the rule might perhaps be stricter in the present case.] It is enough to shew in evidence that the security was unsatisfied: that is the proof that it was valuable, which is all that the statute makes requisite. The count does state the value, 500*l*. [Lord *Denman* C. J. After verdict, it is sufficient, by stat. 7 *G.* 4. *c.* 64. *s.* 21. (*d*), if the offence is described in the words of the statute creating the offence.] Reference has been made to sect. 5 of stat. 7 & 8 *G.* 4. *c.* 29.: but that section relates to a different offence, namely stealing.

Lord DENMAN C. J. I think none of the objections valid: indeed my difficulty is to find a doubt. As to the first: I think it is not necessary to state that the false pretence was made with the intention of obtaining the

(*a*) *Russ. & R.* 127.
(*b*) 2 *Moo. & Rob.* 17.
(*c*) 6 *Q. B.* 126.
(*d*) See *Regina* v. *Martin*, 8 *A. & E.* 481.

thing, if it be proved that in fact the party charged did intend to obtain the thing, made the false pretence, and did thereby obtain it. I am by no means sure that it is necessary even to prove that the representation was made with the particular intent. As to the second objection: we can easily conceive how a belief that the defendant was a captain in the army might lead the other party to give the security: but it is matter to be shewn in evidence. Suppose the prosecutor had been ordered to pay a sum of money to a person named *Hamilton*, a captain in the army; and the prisoner *Hamilton* had pretended that he was a captain in the army; that would have been calculated to produce the payment. The third objection proceeds on an assumption totally gratuitous. No pretence is shewn except that which the indictment avers to have been the means whereby the fraud was effected. What the pretence was, if it had that effect, does not signify. As to the fourth objection, I think the indictment sufficiently shews, in terms, that the pretence was false. As to the fifth objection, the averment that the security was valuable follows the words of the statute, and could be proved only by evidence of a security available at the time of the obtaining.

PATTESON J. I am not sure that the words of stat. 7 *G.* 4. *c.* 64. *s.* 21. may not apply to the first three objections, as well as to the last: but that I need not consider; they clearly do meet the last. Then, as to the other objections, it could not be necessary to state that there was no pretence besides that charged. Had the defendant shewn that there was any other which caused the giving of the security, he must have been

acquitted. Mr. *Ballantine* does not seem to deny that this was such a pretence as might have induced the prosecutor to part with the security: and, if it is shewn on the indictment that the pretence was made, and did produce the effect, and was false to the knowledge of the defendant, it does not appear what additional averment can be wanting. It is enough to say that the pretence was made knowingly, and the money obtained thereby with the intent to defraud, and that the pretence was false to the defendant's knowledge. As to the fourth objection, it is impossible not to connect the allegation of untruth with the time of making the pretence. In *Stead* v *Poyer* (*a*) the question turned on an averment in pleading: here we are looking at the description of the act of the party; the only proof would be to shew that the defendant said "I *am* a captain" &c., or something to the same effect: it is *that* pretence which is said to be "then" false, namely, at the time of its being made.

WILLIAMS J. Mr. *Ballantine*'s admission, that the pretence might cause the obtaining of the money, disposes of a great part of his argument. It is not necessary to allege that the defendant intended to obtain the money by the particular pretence: in *Young* v. *The King* (*b*), though many objections were made, this point was not taken. It is enough to shew a false pretence made and money obtained by it. I agree, as to the fifth objection, that, if any case could be found where it had been held necessary, before stat. 7 *G.* 4. *c.* 64. *s.* 21., to allege that the security was unsatisfied, that might have created a difficulty on such an indictment as this, except for

(*a*) 1 *C. B.* 782.

(*b*) 3 *T. R.* 98.

the statute: but now it is sufficient after verdict that the indictment should, as this does, follow the words of the statute creating the offence. As to the word "then," I doubt whether any other mode of describing the time would have been correct; I do not however say that it might not: but clearly the word here refers to the time of making the pretence.

Lord DENMAN C. J. I am sure that *Rex* v. *Reed* (*b*) was not before the Judges. That decision is not overruled now; for it never took place.

Judgment affirmed.

(*a*) 7 *C. & P.* 848.

Ex parte EVANS.

Thursday, June 11th.

Justices in quarter sessions may in their discretion make an order that barristers, provided as many as four attend, shall have exclusive audience in their Court, though, until such order was made, no barristers have attended the Court except on special retainer, and the business of advocates has always been performed by attorneys only.

THE following order was made by the Justices in Quarter Sessions for *Denbighshire*, on *July* 1st, 1845, and reconsidered, on the motion of two justices, and confirmed, at the sessions for the same county on *January* 6th, 1846.

"Ordered, that the request of the barristers for exclusive audience be granted at all times when four barristers are present. This order to take effect from the next Quarter Sessions inclusive."

Sir *F. Kelly*, Solicitor General, now moved, on behalf of *Thomas Evans* of *Vale Street*, in the town of *Denbigh* in the above named county, attorney at law, for a certiorari to bring up the order of *January* 6th for the pur-

pose of its being quashed. The affidavit in support of the application stated: "That, previously to the making of the said first mentioned order, no barristers at law had ever attended or practised at any Court of Quarter Sessions in the said county, except upon a special retainer, nor, as deponent has heard and believes, at any Court of Quarter Sessions in the principality of *Wales*, except upon a special retainer; and that the attorneys and solicitors of Her Majesty's superior courts at *Westminster*, or, until the abolition of the special judicature of *Wales*, of the Court of Great Sessions for the said county of *Denbigh*, practising in the said court of Quarter Sessions, had at all times audience in the said last mentioned court, and derived therefrom certain gains and emoluments." "That, in virtue of the said order and of the said confirmation thereof, certain members of the bar have, since the making thereof respectively, attended at the said Quarter Sessions for the said county, and have claimed and been permitted to have exclusive audience as advocates, and audience has been refused by the said Court to deponent and several other persons, attorneys of Her Majesty's superior courts at *Westminster*, practising in the said county of *Denbigh*." "That the making of the said orders has caused an actual pecuniary loss to a considerable amount to deponent."

The Solicitor General referred to *Collier* v. *Hicks* (*a*), where the question was on the right of an attorney to act on the hearing of an information before justices at a police office, and *Parke* J. said: "No person has a

(*a*) 2 *B.* & *Ad.* 663.

right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them." In the present instance an ancient usage of the *Welch* Courts of Quarter Sessions was shewn, which the Justices ought not to disturb.

Lord Denman C. J. It is an important rule that, in this as in other respects, all Courts should have power to regulate their own practice. The exception mentioned by *Parke* J. does not reach the present case, but those only in which, by usage, some privilege is given to particular persons exclusively. And any more general argument would apply, not in behalf of attorneys only, but of other persons who would attend at a lower charge even than the attorneys. It is reasonable that, for the purposes of a Court, there should be privileged orders. And, in this case, I think we ought not to interfere with a discretion which, we have no doubt, has been soundly exercised; and which, indeed, appears to have been so exercised, by the condition which the Justices have imposed as to number.

Patteson J. concurred (*a*).

Rule refused.

(*a*) *Wightman* J. was in the Bail Court; *Williams* J. sitting at nisi prius.

Thursday, June 11th.

William Trix, and Mary Courtenay his Wife, *against* Thorne.

Declaration in debt by husband and wife on a money bond given to the wife while sole, dated, to wit, on 27th *September* &c. Breach, nonpayment to her while sole, or to plaintiffs or either of them since the marriage. Plea, craving oyer of the bond and condition, and setting out the condition, which was for payment to the wife (then sole), her executors, &c. or assigns, of 300*l.* with interest for the same on 29th *March* next ensuing the day of the date of the above-written bond; and averring that, from the time of making the bond and condition, defendant hath always in all things duly performed the condition &c.: verification. Replication: That defendant did not nor would pay the sum of 300*l.* with interest for the same on the day and in the manner limited and appointed by the condition, according to the true intent &c. thereof: verification.

DEBT on bond. The declaration stated that defendant, while the female plaintiff was sole, to wit on 27th *September*, 1827, by his writing obligatory, the date whereof is a day and year therein named, to wit the day and year last aforesaid, acknowledged himself to be bound to the female plaintiff in 300*l.*, to be paid to her. Breach, nonpayment to her while sole, or to the plaintiffs or either of them since their marriage.

Plea, after craving oyer of the bond ("and it is read to him &c."), and of the condition, which appeared to be for payment by defendant, his heirs, executors or administrators, to the female plaintiff (then *M. C. Thorne*), her executors, administrators or assigns, of "the full sum of 300*l.* of good and lawful money of *Great Britain*, with lawful interest for the same sum, on the 29th day of *March* next ensuing the day of the date of the above-written bond:" "That, from the time of the making

Demurrer. 1. Because it is not sufficiently alleged in the replication that the day appointed for payment by the condition was past before action brought. 2. Because the replication informally concludes with a verification. 3. Because the replication is double, assigning breaches by nonpayment of principal and nonpayment of interest. 4. Because it does not allege with certainty to whom the money was unpaid, nor whether the default was before or after the marriage.

A Judge, on summons, set aside the demurrer as frivolous; *March* 9th. In the next term, *April* 27th, the defendant moved to set aside the Judge's order.

Held that the demurrer, on points 1, 3 and 4, was frivolous. On point 2, *Quære* whether it was not well grounded.

But the Court refused to overrule the discretion of the Judge in making the order, the plea at all events being bad, and the defendant being late in his application.

the said writing obligatory and condition as aforesaid, hitherto, he" (defendant) "hath always in all things duly performed and fulfilled the said condition of the said writing obligatory, according to the tenor and effect, true intent and meaning thereof." Verification.

Replication. "That the defendant did not nor would well and truly pay or cause to be paid the full sum of 300*l.* of good and lawful money of *Great Britain*, with lawful interest for the same, on the day and time, and in the manner, limited and appointed in and by the said condition of the said writing obligatory, according to the true intent and meaning thereof, but wholly omitted and neglected so to do." Verification.

Demurrer, stating as causes: "1. That no breach of the above condition of the above bond is sufficiently assigned in or by the said replication, in this, that it is not distinctly and properly alleged therein that the day of payment of the said principal sum of 300*l.* with interest had arrived or elapsed before the commencement of this suit, nor that any interest had accrued due when this action was commenced: and that, if the lapse of such day, or the accruing of such interest, can be inferred from any of the allegations in the said replication, the same is uncertain and argumentative only, and not sufficiently positive. 2. That the said replication informally concludes with a verification. 3 That the said replication is either double and multifarious in assigning two breaches of the above condition, namely the nonpayment of the said principal sum and also the nonpayment of the said interest; or it is uncertain and ambiguous in this, that the defendant cannot ascertain whether the allegations therein mean that the said principal sum has not been paid or that the said interest has not been paid, or that neither the said principal sum

nor the said interest has been paid. Lastly: That the said replication is uncertain in this, that it is not alleged to whom the said principal sum with the said interest were unpaid, nor whether the same were respectively so unpaid before or after the marriage of the plaintiffs, nor whether the same were respectively unpaid to the said *M. C. Thorne* or her assigns: and that, as the payment of the said principal with the said interest is by the said condition to be made, in the alternative, either to her or to her assigns, and as it appears by the pleadings that she hath an assign, the nonpayment to her or her assigns should have been expressly alleged."

On summons and hearing, in *Hilary* vacation (*March* 9th) 1846, *Cresswell* J. ordered the demurrer to be set aside as frivolous: and the plaintiff, in the same vacation, signed judgment by default, and proceeded to assessment of damages and taxation of costs, the defendant protesting, at each step, against such proceedings. The costs were taxed and final judgment signed, *April* 8th. In last *Easter* term, *April* 27th (*a*), a rule was obtained calling on the plaintiff to shew cause why the order of *Cresswell* J. should not be rescinded, and the judgment and all proceedings thereon set aside.

Butt now shewed cause, and stated, as a preliminary objection, that the motion was not made in reasonable time, citing *Clement* v. *Weaver* (*b*).

M. Smith, contrà (as to this point). There is no strict rule upon the subject unless where the party who obtained the order has, in consequence of the delay, taken further steps and incurred expense. Where that

(*a*) Term began on 15th *April*.

(*b*) 3 *Man. & G.* 551.

is not so, it is laid down generally that the party dissatisfied may, if the order was made in vacation, "apply to the Court in the following term" to have it set aside: 2 *Chitt. Archb.* 1443 (*a*). The defendant here has not lain by so as to mislead the plaintiff; the case, therefore, differs from *Clement* v. *Weaver* (*b*).

Butt was then desired by the Court to proceed. The first objection is frivolous. The day of payment is not stated in the replication; but it appears sufficiently by the declaration and the condition as set out on oyer. Secondly, the plea of a general performance was bad: the parties could not properly go to issue upon it: the plaintiff therefore could only assign a breach or demur. Except in the case of a bond to perform an award, "if defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has not a cause of action unless he shews one:" note (4) to *Hayman* v. *Gerrard* (*c*), citing *Meredith* v. *Alleyn* (*d*). Being, therefore, obliged to assign a breach, the plaintiff necessarily concluded with a verification. It is true that, in *Roakes* v. *Manser* (*e*), where, to a declaration on a bond conditioned to pay 1000*l.* and interest on a given day, according to a certain indenture, and also, generally, to perform all the covenants of the indenture, a general plea of performance was pleaded, and the plaintiffs replied that defendants did not pay the 1000*l.* in the condition men-

(*a*) 8th ed., Part 6. chap. 2.

(*b*) 3 *Man. & G.* 551. Counsel stated in the present case that the motion was to have been made earlier, but was deferred because the instructions were found to be imperfect.

(*c*) 1 *Wms. Saund.* 103 *d.*, 6th ed.

(*d*) 1 *Salk.* 138.

(*e*) 1 *Com. B.* 531.

tioned in manner and form &c., concluding to the country, the Court held the replication sufficient, being of opinion that, on that record, the plea might be construed as if it had alleged performance of the only special condition by proper averments, in which case the traverse offered by the replication would have been correct. But it does not follow that the strictly accurate form for such a case is not that now adopted. Thirdly, the replication is not double or ambiguous. The condition of the bond, to pay 300*l.* with lawful interest, on a given day, creates one contract to pay one sum; the breach of that contract is a single act; and it is so alleged. *Dickenson* v. *Harrison* (*a*) was cited in moving for this rule: there the Court of Exchequer held that, on a bond for payment of 800*l.* with interest, the plaintiff might declare in debt for the 800*l.* without expressly waiving the interest, the debt and interest being two separate or separable matters: but that does not shew that, on a contract worded as this is, the principal and interest may not be claimed as one debt. Principal and interest are so far an entire thing that payment of interest on a note may be relied upon to take the note itself out of the Statute of Limitations; *Bealy* v. *Greenslade* (*b*). Where, indeed, a penal bill was for payment of a debt by specified instalments, a declaration alleging that defendant did not pay "the said several sums of money, or any of them," was held to be double; *Humphreys* v. *Bethily* (*c*), cited in *Stephen on Pleading*, p. 287, 5th ed.: but there the sums were distinct by the terms of the contract. As to the last objection, it was sufficient to aver that the defendant did not pay in the manner limited by the condition. The default is sufficiently as-

(*a*) 4 *Price*, 282. (*b*) 2 *Cro. & J.* 61.; *S. C.* 2 *Tyr.* 121.

(*c*) 2 *Ventr.* 198. 222. But held there that the fault was cured by pleading over.

certained by reference to the condition. So, in *Jones* v. *Owen* (*a*), an allegation that defendant was indebted to plaintiff in the sum of 20*l.* for goods sold &c., and in consideration thereof "promised" (not adding "the plaintiff") to pay the said moneys to plaintiff on request, was held by Lord *Denman* C. J. to be sufficiently certain, independently of the Rule of Court of *Trin.* 1. *W.* 4 (*b*).

M. Smith, contrà. The discussion which these points have required proves that the demurrer is not frivolous. As to the first point, *Parkinson* v. *Whitehead* (*c*) shews the necessity of expressly averring that the time for performance had elapsed before action brought; and the Court there would not, for the purpose of remedying the want of such averment, notice the date of the agreement, which was laid under a videlicet. The objection there was taken as on general demurrer. [*Patteson* J. Here you have the condition set out on oyer: the date there is given only by reference to that in the declaration, which is under a videlicet; but, if the count had been demurred to, and demurrer books made up, the plaintiff would have been entitled, by Reg. Gen. *Hil.* 2 *W.* 4. I. 44. (*d*), to insert the whole deed at the head of the plea, and that would have removed all objection. May not it be taken now that that is virtually done, which the plaintiff had a right to do?] If he had omitted to insert the whole deed, the Court could have looked only at the pleadings as they stood; and in the present state of this case it cannot be

(*a*) 5 *A.* & *E.* 222.

(*b*) *R. Trin.* 1 *W.* 4. *Schedule*, tit. *Common Counts*, 2 *B.* & *Ad.* 787.

(*c*) 2 *Man.* & *G.* 329. (*d*) 3 *B.* & *Ad.* 380.

assumed that the plaintiff has chosen to exercise such a right. *Tucker* v. *Webster* (*a*) is also a case bearing on this point. It is a settled principle, that, if a plea avers performance generally, the breach must be replied in precise terms. Secondly, *Roakes* v. *Manser* (*b*) shews that, if performance is pleaded generally, and the plaintiff denies it specifically, the replication should conclude to the country, if the performance really consists in the doing of one thing only. *Cresswell* J. there cited *Bush* v. *Leake* (*c*), as shewing that, if the defendant alleges performance by paying money and performing covenants, the replication may properly traverse payment of the money, and conclude to the country. The authorities are collected in the notes to *Hayman* v. *Gerrard* (*d*). The third point is decided by the opinions which the Court of Exchequer delivered in *Dickenson* v. *Harrison* (*e*). That case does not differ in principle from *James* v. *Thomas* (*g*), where it was held that breaches could not have been assigned under stat. 8 & 9 *W.* 3. *c.* 11. *s.* 8., because, by the express terms of the instrument in question, the principal and interest had become one debt. The ruling in *Humphreys* v. *Bethily* (*h*) applies as well to principal and interest as to instalments. Fourthly, the replication should have been as particular as the declaration in mentioning the party or parties to whom the 300*l.* was unpaid. It may have been paid to the husband before action brought.

Lord DENMAN C. J. The first objection clearly fails. The words of the condition, "next ensuing the

(*a*) 10 *M.* & *W.* 371.
(*b*) 1 *C. B.* 531.
(*c*) 3 *Doug.* 255.
(*d*) 1 *Wms. Saund.* 102.
(*e*) 4 *Price*, 282.
(*g*) 5 *B.* & *Ad.* 40, 42.
(*h*) 2 *Ventr.* 198.

day of the date of the above written bond," refer to the date of the bond as given in the declaration. That is under a videlicet; but it is made material by the subsequent pleading. As to the third objection, I think the replication is not double. *Dickenson* v. *Harrison* (*a*) shews that, on a bond for payment of money with interest, the plaintiff may, if he will, declare for non-payment of the principal, and not notice the interest; but it does not prove that he is bound, in a plea, to notice one or the other only. If a party has bound himself to pay a sum of money with interest on a given day, and does not, it is a single breach. As to the fourth point, I think the allegation of non-payment is sufficiently precise. On the second objection I think that the question is more doubtful, and that there may be a good deal of argument on the point decided in *Roakes* v. *Manser* (*b*): but we may take into consideration here that the plaintiff is replying to an irregular plea. And the privilege of setting aside demurrers as frivolous is a very valuable one; and, where a Judge has exercised his discretion on this subject, I should be slow, in the exercise of ours, to interpose. I also think that the time at which this application was made is important. A party had better, in such a case, come on the first day of the term. I do not lay down a precise rule; but the time of moving is a point which ought to be considered. If our attention had been called to it when the present motion was made, we should probably not have granted a rule nisi.

PATTESON J. I am of the same opinion. The declaration is good; and a tricky plea is pleaded: and

(*a*) 4 *Price*, 282. (*b*) 1 *C. B.* 531.

then objections are taken by demurrer to the replication. A learned Judge at chambers has exercised his discretion in setting that demurrer aside as frivolous; and I should not discharge his order, unless I clearly saw that it had done some mischief. That is not the case; for, if the defendant had argued his demurrer, he must have confessed at once that his plea was bad. None of the objections, however, are tenable, unless it be the second. As to the first, the rule, I. 44. of *Hil.* 2 *W.* 4. (*a*), already referred to, would have entitled the plaintiff, if the demurrer had been argued, to set out the whole bond on the paper books; and I think the learned Judge might treat the case as if the whole had been set out. Had that been done, it is agreed that there would have been no ground of objection. As to the verification, *Roakes* v. *Manser* (*b*) certainly decides that if the replication here had concluded to the country it would have been good: but it does not shew that the present conclusion must therefore be bad. With respect to the supposed duplicity in alleging as a breach nonpayment both of principal and of interest, when the party has bound himself to pay a sum with interest on a day certain, and has failed, it is one subject of contract and one breach, let the cases say what they may. As to the last point, the breach of the condition is nonpayment at the day named; and if the condition was once broken it is no matter what may have taken place afterwards. The declaration alleges, generally, a breach by nonpayment; the plea is, fulfilment of the condition; then the replication states, not merely that the defendant has not paid what is claimed in the action, but that he did not pay prin-

(*a*) 3 *B. & Ad.* 380. (*b*) 1 *C. B.* 531.

cipal and interest on the day and in the manner limited and appointed by the condition. My only difficulty is on the verification: but, as a Judge has exercised his discretion upon it, and as the plea is clearly bad, and the defendant has applied so late, I think we cannot say that the order should be set aside (*a*).

Rule discharged, with costs.

(*a*) *Wightman* J. was in the Bail Court; *Williams* J. at nisi prius.

The QUEEN *against* The Poor Law Commissioners for ENGLAND and WALES.

Thursday, June 11th.

In the Matter of ST. MARY ABBOTS, KENSINGTON.

Where, by order of the Poor Law Commissioners, under stat. 4 & 5 *W.* 4. *c.* 76. *s.* 39., guardians are appointed to administer the poor law in a single parish, the consent to an order for building a workhouse in such parish, under sect. 23, must be given by a majority of the guardians, as it is, in the case of a union, under sect. 38; and not by a majority of the rate payers.

THE Poor Law Commissioners, on *March* 21st, 1846, made an order, addressed to the guardians of the poor of the parish of *St. Mary Abbots*, *Kensington*, and commencing as follows.

"We, the Poor Law Commissioners, by and with the consent of a majority of the guardians of the poor of the parish of *St. Mary Abbots*, *Kensington*, in the county of *Middlesex*, testified in writing at the foot of a duplicate of this instrument, and in pursuance of the powers given to us in and by an act" &c. (4 & 5 *W.* 4. *c.* 76.), "do hereby order and direct" &c. The order directed the guardians to purchase a certain site for a work-

When the Poor Law Commissioners, under the privilege given by stat. 4 & 5 *W.* 4., *c.* 76. *s.* 106., shew cause in the first instance against a motion for a certiorari, and succeed, the Court will grant them costs, if proper ground appear for it, though the general rule of practice is that a party shewing cause in the first instance shall not have costs.

house, and to build such house thereon, and empowered them to borrow money for the purpose on the security of the rates. The consent was signed by fourteen persons, styling themselves "the majority of the guardians of the poor of the parish of *St. Mary Abbots, Kensington.*"

The parish of St. *Mary Abbots* has its own board of guardians for the administration of the poor law, under an order of the Commissioners made (*March* 11th, 1845) in pursuance of stat. 4 & 5 *W.* 4. *c.* 76. *s.* 39.

Notice of application for a certiorari as after mentioned was duly served upon the Commissioners.

Martin and *C. Clark* (*a*) now moved for a certiorari to bring into this Court, for the purpose of quashing, the above mentioned order. The objection relied upon is, that, in the particular case of an order for building a workhouse, in a parish not forming part of a union, but having its own guardians, the consent of a majority of the rate-payers is necessary, and a majority of the guardians cannot consent. This turns on stat. 4 & 5 *W.* 4. *c.* 76. *s.* 23., which enacts: "That it shall be lawful for the said Commissioners, and they are hereby empowered, from time to time when they may see fit, by any writing under their hands and seal, by and with the consent in writing of a majority of the guardians of any union, or with the consent of a majority of the rate-payers and owners of property entitled to vote in manner hereinafter prescribed, in any parish, such last mentioned majority to be ascertained in manner

(*a*) The Court, inclining to the opinion that a certiorari could not be granted, allowed *Clark* to support the motion in the first instance.

provided in and by this act, to order and direct the overseers or guardians of any parish or union not having a workhouse or workhouses, to build a workhouse," and to purchase land &c. The only majority there authorized to consent, is, in a union, the majority of guardians "of any union"; in a parish, a "majority of the ratepayers and owners of property entitled to vote" &c. "in any parish." Where several parishes are united, it would be inconvenient that the respective bodies of ratepayers should vote: the ratepayers of one parish have no means of influencing those of another; and the votes of the parishes might be equally divided: the guardians, therefore, vote, in a representative capacity. But in the case of a single parish no such inconvenience arises; and the words of the statute are express. Reference may be made to sect. 39, which enacts that, if the Commissioners shall, by their order, "direct that the administration of the laws for the relief of the poor of any single parish should be governed and administered by a board of guardians, then such board shall be elected and constituted, and authorized and entitled to act, for such single parish, in like manner in all respects as is hereinbefore enacted and provided in respect to a board of guardians for united parishes." But that refers to sect. 38, which provides for administering the relief of the poor, and governing the workhouses, in a union, by "a board of guardians." The purposes for which those bodies act are different from that contemplated in sect. 23; and the act of a board (whose functions, under sect. 38, may be executed by three only of the members) is widely different from that of a number of individuals, not proceeding as an official body, but deciding by their majority. The board of a parish

under sect. 39 is assimilated by the statute to that of a union under sect. 38; but the power under sect. 23 is not given to a board: and sect. 21 provides: "That nothing herein contained shall be construed to give the said Commissioners or Assistant Commissioners any power to order the building, purchasing, hiring, altering, or enlarging of any workhouse, or the purchasing or hiring of any land at the charge or for the use of any parish or union, save and except so far as such powers are expressly given by this act." Now, "if a particular thing be given or limited in the preceding parts of a statute, this shall not be taken away or altered by any subsequent general words of the same statute:" *Dwarris on Statutes*, 514 (*a*), where *Standen* v. *University of Oxford* (*b*) is cited. *Churchill* v. *Crease* (*c*) (judgment of *Best* C. J.) is to a similar effect. Therefore sect. 39 does not take away the privilege of the ratepayers under sect. 23. The distinction between guardians of a union and guardians of a parish has been the ground of decision in several cases; *Regina* v. *The Justices of Surrey* (*d*), *Regina* v. *The Guardians of Lambeth* (*e*), *Regina* v. *St. Mary, Southampton* (*e*).

Sir *F. Thesiger*, Attorney General, Sir *F. Kelly*, Solicitor General, and *Tomlinson*, contrà, were to have shewn cause in the first instance, but were not heard.

Lord Denman C. J. It is only necessary, for the decision of this case, to see what the words of the

(*a*) 2d ed.
(*b*) 1 (*W.*) *Jones*, 17. 26.
(*c*) 5 *Bing.* 177. 180.
(*d*) 5 *Q. B.* 506.
(*e*) 5 *Q. B.* 512.

statute are. Sect. 21 provides that nothing in the act shall give the Commissioners any power to order the building of any workhouse, or purchasing any land, at the charge of any parish or union, "save and except so far as such powers are expressly given by this act." Then the power given by sect. 23 is to make orders upon "the overseers or guardians of any parish or union" for these purposes, "with the consent in writing of a majority of the guardians of any union, or with the consent of a majority of the ratepayers and owners of property entitled to vote in manner hereinafter prescribed, in any parish, such last mentioned majority to be ascertained in manner provided in and by this act." I agree that the power is subject to the consent of each body respectively in each case. The parish may be in such a situation that the body of ratepayers must be called upon but that is where there is no board of guardians. If a board of guardians has been appointed for the parish, the specific provision requiring the consent of guardians attaches as it would in a union. The act must be read as if there had been a clause with three divisions, providing, first, that, where guardians were appointed for a union, those guardians should give the consent; secondly, that, if there were no guardians, the consent should be by vote of the ratepayers in the parish; thirdly, that, if there were guardians for the parish, the power of consent should be with them.

Patteson J. I am of the same opinion, though I adhere to the distinction drawn in former cases between guardians of a union and guardians of a parish. As to the argument that guardians of a union always act as a

board, it may be observed that, by one of the provisoes of sect. 38, the Commissioners, if they think proper, may order them to act differently. But the real question is, whether *St. Mary Abbots*, being made, by order of the Commissioners, a district which is to have guardians, is not, for the present purpose, in the same situation as if it were part of a union. Now, by sect. 39, if the Commissioners order that the administration of the laws for the relief of the poor in a single parish shall be under a board of guardians, "then such board shall be elected and constituted, and authorised and entitled to act, for such single parish, in like manner in all respects as is hereinbefore enacted and provided in respect to a board of guardians for united parishes." There is no restriction or qualification. The guardians of a parish act for and bind the parish as those of a union act for and bind the union. The provision, in sect. 23, for a consent by the majority of ratepayers, points to the case, as distinguished from these two, where the parish is still under the old law. No doubt can arise, unless upon a very strict construction of the word "expressly" at the end of sect. 21. But the power in question is expressly conferred, in unions, by sect. 38; and sect. 39, referring to that clause by the words "in like manner in all respects as is hereinbefore enacted," gives the power as expressly in parishes.

Writ refused.

Sir *F. Thesiger*, Attorney General, then moved for the costs of the application. (*C. Clark*, contrà, pointed out that stat. 4 & 5 *W.* 4. *c.* 76. *s.* 107. recognizes the right to costs only where the order has been actually removed by the writ of certiorari, and declared legal by

the Court.) If the writ here had been granted, the Commissioners would have been obliged to appear, and would have been entitled to their costs by the express words of sect. 107. But the application is now to the discretion of the Court. In general, it is true that parties voluntarily appearing in the first instance do not obtain their costs; but this statute, sect. 106, enacts that, on notice of application for a certiorari to remove an order of the Commissioners, "it shall be lawful for the said Commissioners to shew cause in the first instance against such application, and the Court may, if it shall so think fit, forthwith proceed to hear and determine the same." The effect of this clause ought to be that the Commissioners, when availing themselves of it, stand in the same situation as to costs with parties who shew cause in the usual course.

Lord DENMAN C. J. We think that the permission given to the Commissioners to come in and shew cause in the first instance brings them within the ordinary rule of practice as to costs. And Mr. *Martin* cannot allege that his own application was so utterly groundless, that, if cause had not been shewn in the first instance, we should not have granted a rule nisi. The costs will therefore be allowed.

PATTESON J. concurred (*a*).

Costs allowed.

(*a*) *Williams* J. was in the Bail Court; *Wightman* J. sitting at nisi prius.

Doe on the several Demises of Sir William Molesworth, Bart., and Others, *against* Sleeman.

Where a legal manor has once existed, declarations of persons deceased as to its boundary are still admissible in evidence, though the manor has ceased to exist otherwise than by reputation.

EJECTMENT for land &c. in the county of *Devon*.

On the trial, before *Coleridge* J., at the *Devon* Spring assizes, 1845, it appeared that Sir *W. Molesworth* claimed, as his own land, certain slips of ground called landscores, extending respectively to the distance of eighteen feet from the boundary fences of an alleged manor called *Affaland*, of which he was the proprietor: and it became a question, on the evidence, whether *Affaland* was or was not a manor, and whether, if it had formerly been a manor, it had not ceased to be so, and become only a manor by reputation. In proof of title to the landscores, the plaintiff's counsel offered in evidence declarations of old persons deceased as to the reputed boundary of the manor, and as to the claim of eighteen feet beyond the fence as part of the manor lands. The evidence was objected to, but received: and *Coleridge* J., in summing up, told the jury that it was entitled to their consideration, if they were of opinion that *Affaland* was a manor; but he said: "if it is only a reputed manor, that which may or may not have been formerly a manor, but which has ceased to be so, the principle upon which that evidence has been received fails, because, it having become a private estate, then such evidence ought not to have been received." He therefore left it to them to decide, in the first instance, whether *Affaland* was a manor or not; and he added: "If you are of opinion that it is not a manor, I would not advise you to attach

any importance to the evidence of the old people, as the plaintiff had no right then to give that evidence. They could have no concern about what was the boundary, any more than if it was an ordinary estate: but, if you are of opinion that it has been proved to be a manor, then you are bound to attend to that." The jury said they were of opinion that the plaintiff had not made out his case; and they found for the defendant.

J. Greenwood, in *Easter* term, 1845, obtained a rule nisi for a new trial on account of misdirection. He cited *Steel* v. *Prickett* (*a*) and *Soane* v. *Ireland* (*b*). In last *Easter* term (*c*),

Crowder, *Butt* and *Merivale* shewed cause. The direction was right. It may be admitted, though not actually decided in *Steel* v. *Prickett* (*a*), that reputation is evidence to prove the existence of a manor: it may also be granted that, where a manor is shewn to exist, reputation may be evidence as to its boundary: but here it is contended for the plaintiff that, although a manor be not proved to exist otherwise than as a manor by reputation, evidence of reputation is receivable on the question whether certain lands are parcel of it, or no parcel. *Soane* v. *Ireland* (*b*) is not in point. There the plaintiff alleged seisin in fee of the manor of *Froome Selwood*, and a prescriptive right in the lord to appoint a sexton. It appeared in evidence that *Froome Selwood* was once a legal manor, but had ceased to be so for want of freehold tenants: but Lord *Ellenborough* said: "If *Froome Selwood* were once a manor, as it appeared, this prescriptive right

(*a*) 2 *Stark. N. P. C.* 463. (*b*) 10 *East*, 259.

(*c*) *May* 4th. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

would still belong to it, though other manorial rights, such as that of holding courts for want of freehold tenants, might be gone and severed from it. It would still be a manor by reputation for this purpose, which will satisfy the allegation." Here the question is, not of a right once appurtenant to a manor, and which may survive though the manor is extinct, but of something alleged to be parcel of the manor itself. As to that, reputation can no longer be evidence when there is no longer a manor. There may be incidents to a manor by reputation, such as waste, of which reputation may be proper evidence; but such evidence can apply to those things only. While there is a manor, its boundary, to those occupying land within it, is a matter of public interest: but that reason for admitting evidence of reputation ceases with the legal existence of the manor.

J. Greenwood (with whom was *M. Smith*), contrà. It does not inevitably follow that a manor loses that character because the lord buys up the estates, or ceases to hold courts: but, supposing that *Affaland* had ceased to be a legal manor at the time to which the evidence related, yet, as it might continue a manor by reputation (*Co. Copyholder*, sect. 31, pp. 52, 53, *Rex* v. *The Bishop of Chester* (*a*), *Sir Moyle Finch's Case* (*b*), 2 *Chitt. Blackst.* 90, 91, note 14., 1 *Watk. Cop.* 21.), evidence of reputation was admissible, both to prove that it was a reputed manor, and to shew what were its limits. *Abbott* C. J. seems to have thought such evidence admissible for both purposes, in *Steel* v. *Prickett* (*c*). [Lord *Denman* C. J.

(*a*) *Skinn.* 651. 661.
(*b*) 6 *Rep.* 63 *a.* 66 *a.*
(*c*) 2 *Stark. N. P. C.* 463.

It is essential to a reputed manor that it should have been legally a manor: but, if it has been a manor, and has ceased, twenty years back, to be so, why may not declarations respecting it be admitted in evidence?]

The further hearing of the case was adjourned: and, in this term (*May* 26th), without calling upon counsel to resume the argument,

Lord DENMAN C. J. delivered the judgment of the Court.

The plaintiff claimed this property, seeking to prove it his by shewing that it was within the boundary of his reputed manor of *Affaland;* as to the line of which boundary he tendered evidence of reputation. The learned Judge told the jury that they were to consider whether this reputed manor was a manor, and that, if it were not, evidence of reputation as to the line of boundary ought not to be considered by them, because in that case there was no probability of conversations taking place on this subject, as there were no tenants of the manor interested in holding such conversations.

But, on consideration, we cannot accede to this doctrine: for a reputed manor is that which has been a manor, though from some supervening defects it has ceased to be so. There seems to be no reason why such conversations might not be held during the existence of the manor, and kept in the memory since. And, further, the supposed discourse which may be proved as reputation is not confined to tenants, but may proceed from any persons residing in the neighbourhood, and likely to have been engaged in talking upon the subject.

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Doe dem. Molesworth v. Sleeman.

Curzon v. *Lomax* (*a*) and *Soane* v. *Ireland* (*b*) are among the authorities on these points.

Rule absolute.

(*a*) *5 Esp. N. P. C.* 60. (*b*) 10 *East.* 259.

Friday, June 12th.

The Queen *against* Sir Richard Dobson, John Sutton, and Two Others.

Where an indictment is prosecuted by persons having some interest in the subject-matter, and is removed by certiorari, the prosecutors, on conviction, are entitled to costs under stat. 5 & 6 *W. & M. c.* 11. *s.* 3., as parties grieved, though the expenses of prosecution have been paid by other persons.

THE defendants in this case having received judgment in *Trinity* term 1845 (*a*), a side-bar rule was obtained in the same term (*June* 12th), entitled, "*The Queen* against *Sir Richard Dobson, Knight, and Others,*" for taxation of the costs "to be paid by the defendants to the prosecutors" or their attorney (*b*); and the costs were accordingly taxed, and an allocatur signed. In the present term a rule was obtained for

An attachment for not paying such costs may be obtained against one of several defendants, on affidavit of demand upon and non-payment by him. If his co-defendants have paid, it is for him to shew it on motion to set aside the attachment.

It is not an objection available on such motion, that the rule to tax was obtained as against all the defendants, and that the rule for an attachment is entitled as in a prosecution against all.

(*a*) *Regina* v. *Dobson*, 6 *Q. B.* 637. 648, note (*b*).

(*b*) In *Michaelmas* term 1845, *Badeley* obtained a rule nisi to set aside this rule, on the ground that the prosecutors were not the real parties aggrieved. Cause was shewn in the same term (*November* 24th), by *M. Chambers, Keane, Pigott* and *Hugh Hill;* and *C. C. Jones* Serjt. and *Badeley* were heard in support of the rule. The Court (Lord *Denman* C. J., *Williams* and *Wightman* Js.) said that there clearly were some among the alleged prosecutors who were parties aggrieved; and that this was enough, at any rate, to support the side-bar rule, subject to any question which might be raised before the Master. Rule discharged, without costs.

an attachment against the defendant *Sutton*, on an affidavit sworn by *Robert Swan*, stating himself to be the attorney for *John Watkins*, *William White*, *William Sexton Forrest*, *Joseph Samuel Doust*, and *William Hartwell Humphreys*, "the prosecutors, in the matter of this prosecution," and by *Watkins* and the four other last named prosecutors. The affidavit stated service of the side-bar rule and allocatur upon *Sutton*, "one of the defendants in the matter of the above prosecution and one of the defendants in the rule hereunto annexed and at whose instance alone this indictment was removed" into the Queen's Bench; demand from *Sutton* of the amount named in the allocatur; non-payment by him "to the prosecutors in the matter of this indictment or to either of them, or to any person on his or their or either of their behalf;" and that the said sum remains due and unpaid. The rule for an attachment was entitled "The *Queen* against Sir *Richard Dobson*, Knight, *John Sutton*," &c. (naming the other two defendants), but ordered that an attachment should issue "against the defendant *John Sutton*, for his contempt in not paying" &c.

Badeley now moved for a rule to shew cause why the attachment should not be set aside.

By affidavit sworn on a former occasion (*a*) by the attorney for the defendants, but used in support of this rule, it appeared that the indictment was for a nuisance caused by erecting an embankment on the banks of the *Thames* at *Greenwich*; that the prosecutors mentioned in the rule for judgment were the five above named, and *James Dobson*, *John Fossey*, and *George Barwis*: that *James Dobson* was a surveyor residing at *Green-*

(*a*) On the application mentioned antè, p. 302, note (*b*).

wich, and employed by persons there, united together and called "The United *Greenwich* Waterman's Floating Accommodation Society," as their surveyor: that *Fossey* was a pensioner at *Greenwich Hospital;* that *Watkins*, *White*, *Forrest*, *Doust* and *Humphreys* were watermen at *Greenwich*, and were some of the members of the said *Waterman*'s Society; and that *Barwis* was an attorney at *Greenwich*, employed as such by the Society in this prosecution. That none of these persons was a party grieved, or a justice, mayor, &c.: following the enumeration in stat. 5 & 6 *W.* & *M. c.* 11. *s.* 3. That, as deponent was informed and believed, *Watkins*, *White*, *Forrest*, *Doust* and *Humphreys* were, with others (above a hundred in number) forming the said Society, the proprietors of a floating pier connected with the shore by barges &c., moored in the *Thames* at *Greenwich* in front of the embankment which was the subject of prosecution. That, as deponent was informed &c. the indictment was preferred and prosecuted at the instance of the said Society, aided by other persons, and *James Dobson*, *Fossey*, *Watkins*, *White*, *Forrest*, *Doust*, *Humphreys* and *Barwis* were only the nominal and not the real prosecutors: and divers persons, acting on behalf of the said Society, had from time to time, during the proceedings on the indictment, by advertisements in the newspapers and otherwise, applied for and obtained, by subscription and voluntary contribution, large sums of money for the purpose of enabling the said Society to carry on the prosecution. That, as deponent was informed &c., the costs of the prosecution had been paid by the Society, and not paid or borne by *James Dobson*, *Fossey*, &c., nor were they jointly or separately liable for the same, unless as members of the Society. The affidavit gave other details,

corroborating the above statements; and particularly specified certain payments made to several of the alleged prosecutors, for loss of time &c. in the course of the prosecution, by a person not named as a prosecutor, but a member of the Society and one of their managing Committee.

Badeley contended, on these statements, that the parties on whose behalf as prosecutors the side-bar rule had been obtained were not entitled to costs under stat. 5 & 6 *W. & M. c.* 11. *s.* 3., the indictment having been prosecuted exclusively by subscription from other parties; *Rex* v. *Cook* (*a*). [Lord *Denman* C. J. Has not that case been doubted? I think we have been of opinion that a subscription was not for the relief of the guilty party.] It has not been over-ruled: in *Regina* v. *Williams* (*b*) it was only distinguished from the case under discussion. *Rex* v. *Dewhurst* (*c*) is also an authority on this point. The supposed prosecutors here were not grieved more than any other persons who might have some general interest in the navigation; and the case is within the authority of *Rex* v. *Incledon* (*d*) and *Rex* v. *Ingleton* (*e*). Further, the side-bar rule was for taxing costs against all the defendants; and the rule for an attachment is entitled as in a prosecution against all; whereas the attachment is ordered to issue against *Sutton* only. No application for payment appears to have been made to any other party. The other defendants might have paid the costs; and it is not directly sworn that they have not.

Lord DENMAN C. J. (after conferring with the Master). The Master has considered *Sutton* liable to

(*a*) 1 *Mann. & Ry.* 526.
(*b*) 6 *Q. B.* 273.
(*c*) 5 *B. & Ad.* 405.
(*d*) 1 *M. & S.* 268.
(*e*) 1 *Wils.* 139.

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these costs. There were three other defendants: but the rule, though entitled as against all, was, in fact, against him only; the rest were not in any way made parties to it. If any of the other defendants had paid the costs, it was for you to shew it. As to the other question, we entered fully into it in *Regina* v. *Williams* (*a*). In *Rex* v. *Cook* (*b*) the subscribers had been the prosecutors. Here the parties grieved had been the prosecutors; only they were assisted by others. We think the attachment perfectly regular.

Patteson and Williams Js. concurred.

Rule refused.

(*a*) 6 *Q. B.* 273. (*b*) 1 *Mann. & Ry.* 526.

Friday, June 12th.

Hamelin *against* Bruck and Hirschfield.

Declaration in assumpsit alleged that plaintiff, in *France*, drew a bill, for a sum named, on defendant, which defendant accepted. Issues were joined: first, on a plea of non-acceptance; secondly, on a traverse of a plea alleging that plaintiff, after the acceptance, and without defendant's consent, changed the purport of the bill by altering the sum for which it was drawn.

Assumpsit. The first count charged that plaintiff, to wit on 14th *December*, 1845, in parts beyond the seas, to wit at *Paris*, in the kingdom of *France*, made his bill of exchange in writing, and directed the same to defendants (by the name &c.), and thereby required defendants to pay to his order the sum of one hundred and twenty two pounds sterling, two shillings, two months after date, which period had elapsed before the commencement of this suit; and

On the trial it appeared that the bill had been originally drawn in *Paris* for a larger sum than that named, but that defendant had accepted for a smaller sum. In the body of the bill the sum originally named had been altered to that for which defendant had accepted but it did not appear by whom, or at what time or place, the alteration had been made. No stamp was on the bill.

Held, that plaintiff was entitled to a verdict on both issues: the acceptance by defendant furnishing evidence that he assented to the insertion of the smaller sum; and it not being shewn that the alteration, even if made by the parties contrary to their original intention was made in *England*, so as to render a stamp requisite.

defendants then accepted the said bill (by the said name &c.), and promised plaintiff to pay him the same, according to the tenor and effect thereof, and of the said acceptance. Second count, on an account stated.

The defendant *Bruck* pleaded: 1. To the first count, that neither he nor *Hirschfield* accepted; issue thereon: 2. To the second count, Non assumpsit; issue thereon.

The defendant *Hirschfield* pleaded: 1. To the first count, that, after the said making of the said bill of exchange by plaintiff, and also after the said acceptance thereof by defendants, and before the commencement of this suit, to wit 1st *February* 1846, plaintiff, without the knowledge or consent of defendant or of *Bruck*, altered and changed the purport and effect of the said bill of exchange in this, to wit by striking out with ink and erasing and obliterating therefrom the said sum of money so thereby required to be paid by defendants, in the first count of the declaration mentioned. Replication, that plaintiff did not alter or change the purport or effect of the said bill of exchange in manner and form &c. Issue thereon: 2. To the second count, Non assumpsit. Issue thereon.

On the trial, before *Wightman* J., at the *Middlesex* sittings in this term, the plaintiff produced an unstamped bill. The bill, so far as respects the question decided in this case, appeared to have been originally drawn as follows:

"Paris. Le 14 Décembre 1845. B. P. F. £124.

"A deux mois de date payez par ce mandat
a mon ordre la somme
de Cent vingt quatre Livres Sterling
valeur reçue en marchandise que passerez suivant
votre avis.

Bon pour Cent vingt quatre Livres Sterling."

This was signed by plaintiff, and addressed to the defendants "à Londres," whose acceptance was written as follows: "Accepted for one hundred and twenty two pounds two shillings. *Bruck* & C^ny."

The "124" in the body of the bill was erased, and there was substituted: "122 = 2." And above this was written "acceptée pour £122.2." Upon the first "quatre" was written the word "deux:" and, after and a little above the first "Sterling," were inserted the words "Deux pence." The second "quatre" was erased, and the word "deux" substituted; and after the last "Sterling" was added "Deux Pence." No evidence was given as to the time or place at which, nor as to the person by whom, these alterations were made.

It was contended, on the part of the defendants, that the bill, before the alteration, was not drawn as described in the declaration (*a*): that the alteration was to be explained by the plaintiff: and that, even if the bill was rightly altered, it required a stamp, unless shewn to have been altered out of *England*. The learned Judge directed a verdict for the plaintiff on the issues on the first count, and for the defendants on those on the second count; reserving leave to move to enter a verdict for defendants on the first count.

Humfrey, on a former day in this term, obtained a rule nisi accordingly.

Hoggins now shewed cause. No stamp was necessary. The bill, having been drawn in *Paris*, did not

(*a*) No objection was taken in banc on the ground that the bill, even as altered, was for 122*l.* 0*s.* 2*d.* and not for 122*l.* 2*s.*: but it was assumed that the bill, in its new form, corresponded with the declaration and the acceptance.

become *English* by the acceptance here, nor by the insertion of the sum. In *Snaith* v. *Mingay* (*a*) a bill was signed and indorsed in *Ireland*, with blanks for the date, sum, time for payment and drawee's name; it was transmitted to *England* and there filled up: and this Court held that it had not become an *English* bill, but that it was a complete *Irish* bill by relation to the signing and indorsing. In *Byrom* v. *Thompson* (*b*) a promissory note was altered by the addition of the words "or order," six months after it was given: and, there being evidence to satisfy the jury that this was a correction with the consent of the maker, the Court held that no fresh stamp was required. Here the defendant, by accepting for the lesser sum, furnishes evidence that he assents to the bill being drawn for that sum, and is in a position like that of the maker of the promissory note in *Cariss* v. *Tattershall* (*c*). If the suggested defence be available, it seems that it can be so only on behalf of the defendant who has pleaded the alteration specially; *Mason* v. *Bradley* (*d*). Even if the bill became a new bill, that would not make a stamp requisite, unless the renovation took place in *England*, of which the learned Judge makes no report.

Humfrey and *Tapping*, contrà. In *Snaith* v. *Mingay* (*a*) there never was a complete bill till the blanks were filled up: here the bill was complete before it reached

(*a*) 1 *M. & S.* 87. See *Abrahams* v. *Skinner*, 12 *A. & E.* 763.

(*b*) 11 *A. & E.* 31. See *Bradley* v. *Bardsley*, 14 *M. & W.* 873.

(*c*) 2 *M. & G.* 890.

(*d*) 11 *M. & W.* 590. See *Parry* v. *Nicholson*, 13 *M. & W.* 778. This point was not further discussed. It appears that the first plea of the defendant *Hirschfield* admits the drawing the bill as stated in the first count.

England; and it became a new bill by the subsequent alteration. The defendants shewed no assent to the alteration of the bill by accepting for the lesser sum; the acceptance would be good, though the bill had been unaltered: a drawee may accept for a part; *Wegersloffe* v. *Keene* (*a*) (where the bill was declared upon as drawn for the whole): *Petit* v. *Benson* (*b*). The bill is here untruly described in the declaration. *Byrom* v. *Thompson* (*c*) was decided on the authority of *Kershaw* v. *Cox* (*d*), where the alteration was made in pursuance of the original intention of the parties. Here that is not pretended. In *Cariss* v. *Tattershall* (*e*) the alteration was explained, in the same way, by the party who made it. [*Patteson* J. In *Bathe* v. *Taylor* (*g*) the parties consented to an alteration after acceptance, the bill being in the drawer's hands for value; and the bill was held invalid for want of a new stamp: but the Court threw out a strong intimation that it would have been otherwise, had the alteration been in pursuance of the original intention of the parties: and in *Brutt* v. *Picard* (*h*) *Abbott* C. J. held that a mistake might be corrected, though without the actual knowledge of the parties.] The intention, if insisted upon as justifying the alteration, should be left to the jury; *Taylor* v. *Mosely* (*i*). The rule is that a new stamp is required wherever the bill is altered after being in the hands of a party who can enforce it (*k*). If the bill became new when altered, it would require a stamp, unless the alteration was made

(*a*) 1 *Str.* 214. (*b*) *Comb.* 452.
(*c*) 11 *A. & E.* 31.
(*d*) 5 *Esp. N. P. C.* 246. See *Knill* v. *Williams*, 10 *East*, 431.
(*e*) 2 *M. & G.* 890. (*g*) 15 *East*, 412.
(*h*) *Ry. & M.* 37. (*i*) 6 *C. & P.* 273.
(*k*) See *Downes* v. *Richardons*, 5 *B. & Ald.* 674.

abroad: nothing was proved as to the time or place of alteration: and it is for the parties seeking to enforce an altered bill to explain the alteration.

Lord DENMAN C. J. I do not see that the view which I took when the motion in this case was made, namely, that the bill when accepted for the smaller sum might be considered as drawn for the smaller sum, involves any fallacy. But, as the course of precedents is the other way, it may perhaps be safer to describe the bill as originally drawn. Here, however, the alteration is one to which the defendants cannot object.

PATTESON J. This case is not like *Knight* v. *Clements* (*a*), where nothing appeared to account for the alteration. Here the defendants themselves have accepted for the smaller sum. Now, first, the new sum may have been inserted in pursuance of the drawer's original intention: he may have intended to draw for the sum which was due in fact, and have acquiesced in the drawees' estimate of that. Secondly, I cannot see why we are to presume that the alteration was made in *England:* and, if it was made in *France*, it is conceded that no stamp was necessary.

WILLIAMS J. It is not suggested that the objections could prevail if there were clear evidence that the parties both intended the bill to stand for the smaller sum. Now what can be stronger evidence of the defendants' consent than their substituting the lesser sum by their acceptance?

Rule discharged.

(*a*) 8 *A. & E.* 215.

Friday, July 12th.

Amelia Fancourt *against* William Thorne.

T. made a note in the following terms. "On demand I promise to pay *H.*, or order, 500*l.*, for value received, with interest, at the rate" &c.; "and I have lodged with the said *H.* the counterpart leases, signed by *D.*", &c., "for ground let by me to them respectively, as a collateral security for the said 500*l.* and interest. 500*l.*"

Held, that this might be sued on as a promissory note, and read in evidence, though stamped as a note only.

Assumpsit. The first count stated that defendant, on &c., made his promissory note in writing, and thereby promised to pay on demand to *William Thomas Hodsoll*, or order, 500*l.*, with interest at 4 per cent., and then delivered the said note to the said *W. T. H.*; and *W. T. H.* indorsed to plaintiff; of which defendant had notice, and then, in consideration of the premises, promised plaintiff to pay the said note, according to the tenor and effect thereof. Breach, nonpayment; and averment that there was, at the time of action brought, and still is, due &c., upon and by virtue of the said note, as well the said 500*l.* as a further sum, to wit &c., for interest thereon at the rate &c., amounting together &c.

Counts for money lent, interest, and on an account stated.

Pleas. 1. To the first count, that defendant did not make the promissory note in the declaration mentioned, in manner &c.: conclusion to the country. Issue thereon.

2. As to the residue of the declaration, Non assumpsit. Issue thereon.

On the trial, before *Williams* J., at the *Middlesex* sittings in this term, the plaintiff, in support of the first issue, offered in evidence a written paper, of which the following is a copy.

London, 16th *September*, 1833.

"On demand, I promise to pay *William Thomas Hodsoll*, or order, the sum of five hundred pounds, for value received, with interest at the rate of four per cent.; and I have lodged with the said *William Thomas Hodsoll* the counterpart leases, signed by *George Davis*, *John Jewell*, *William Hill* and *William Gould*, for ground let by me to them respectively, as a collateral security for the said five hundred pounds and interest.

"£500. *Wm. Thorne.*"

This paper was stamped as a promissory note. It was objected that, in respect of the latter part of it, there should also have been a stamp as for a mortgage or agreement. The learned Judge admitted the note; and, proof being given of the signature and indorsement, directed a verdict for the plaintiff on the first count, giving leave to move for a nonsuit. *Gray*, on a former day of this term, obtained a rule nisi accordingly.

Maynard now shewed cause. No stamp was requisite, in respect of the additional matter, to enable the plaintiff to give this paper in evidence as a note. First, the additional matter does not qualify its effect as a note. In *Wise* v. *Charlton* (*a*) the instrument was in the present form: and, it appearing to have had a promissory note stamp before it was completed, it was held that, assuming the part relating to the deposit of title deeds to constitute a mortgage, the mortgage stamp might be affixed after the making, and yet the instrument be sued on as a note. That shews that the part

(*a*) 4 *A. & E.* 786.

which here constitutes the promissory note may be proceeded upon without reference to the rest. It is not sought to make any use of the rest, which need not be looked at for the purpose of giving effect to the note: and that is the proper test; *Williams* v. *Gerry* (*a*), *Smart* v. *Nokes* (*b*), *Odye* v. *Cookney* (*c*), *Robson* v. *Hall* (*d*) (which is apparently recognised by *Holroyd* J. in *Reed* v. *Deere* (*e*)), *Evans* v. *Pratt* (*g*), *Shipton* v. *Thornton* (*h*). But, further, no stamp was requisite here in respect of the latter part of the instrument, even considered by itself. It is not a mortgage at all: it is a memorandum of a fact only, and neither constitutes nor furnishes evidence of a contract. An acknowledgment of a liability to a claim, with a promise to pay, was held not to require a stamp, in *Beeching* v. *Westbrook* (*i*), on the ground that the stamp was required only for documents shewing the terms of a contract. [Lord *Denman* C. J. referred to *Robertson* v. *Showler* (*k*).]

Butt and *Gray*, contrà. *Wise* v. *Charlton* (*l*) was a case in which the present question could not arise, inasmuch as there were stamps sufficient for each part of the instrument, and the promissory note stamp was affixed before the note was made, which was enough in an action brought on the note. But here is an equitable mortgage, or at least a writing furnishing evidence of a contract of lending and borrowing, without any stamp. [*Patteson* J. No: it is merely an asser-

(*a*) 10 *M. & W.* 296. 306.
(*b*) 6 *M. & G.* 911. 916.
(*c*) 1 *Moo. & Rob.* 517.
(*d*) 1 *Peake's N. P. C.* 127. 128.
(*e*) 7 *B. & C.* 261. 264.
(*g*) 3 *M. & G.* 759.
(*h*) 9 *A. & E.* 314. 331.
(*i*) 8 *M. & W.* 411.
(*k*) 13 *M. & W.* 609.
(*l*) 4 *A. & E.* 786.

tion of the fact of the deposit: How can you distinguish the case from *Beeching* v. *Westbrook* (*a*)? How can you say it is an instrument binding the parties? Lord *Denman* C. J. It merely mentions a fact which in itself might be treated in chancery as a mortgage: the written instrument is no mortgage.] The letters in *Beeching* v. *Westbrook* (*a*) were not such as to furnish evidence of an agreement. [*Patteson* J. The Court of Exchequer assumed that they contained an acknowledgment of a debt and evidence of a previous promise. Lord *Denman* C. J. This is not a contract between parties: it is in vacuo.]

Per Curiam (*b*).

Rule discharged.

(*a*) 8 *M. & W.* 411.
(*b*) Lord *Denman* C. J., *Patteson* and *Williams* Js.

The QUEEN *against* The GREAT NORTH of ENGLAND Railway Company.

Friday, June 12th.

A corporation aggregate may be indicted for a misfeasance.

As, an incorporated railway Company, for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred on the Company by act of Parliament.

INDICTMENT. The first count charged that, before and at the time of the committing of the offences &c., to wit 3d *July* 1838, there was, and from thence hitherto hath been, and still is, to wit at the township of *Hurworth*, in the county of *Durham*, a certain common and public Queen's highway, leading from the village of *Hurworth*, in the county of *Durham*, unto *Croft Bridge*, also in the said county, used by and for all the liege subjects &c., on foot, and with their horses, &c., and carriages, to go, return, &c., at their free will and

pleasure: and that *The Great North of England Railway Company* (*a*), on the said 3d day &c., with force and arms, at the township &c., unlawfully and injuriously did cut through, dig up and subvert, and did cause to be cut through, &c., great part of the said highway, to wit forty yards &c. of the said highway, and then and there, unlawfully and injuriously, did dig and make, and did cause to be dug and made, across the said highway, a certain cut and trench, to wit a cut and trench of great length &c., to wit of the length &c., and then and there, unlawfully and injuriously, did remove, take and carry away, and did cause to be removed, &c. from and out of the said cut and trench, divers large quantities of earth, &c., to wit one hundred tons &c., and then and there, unlawfully and injuriously, did cast, lay down, &c., and did cause to be cast, laid down,

(*a*) Stat. 6 & 7 *W.* 4. *c.* cv., local and personal, public, "for making a railway from near the river *Tyne* to or near the river *Tees*, to be called '*The Great North of England Railway*,' in the county of *Durham*," by sect. 1, incorporates the Company by the name and style of "*The Great North of England Railway Company*."

Sect. 11 authorises the Company, "for the purposes and subject to the provisions and restrictions of this act," to enter lands &c., and, among other powers, to construct in, upon, across, under or over the railway, or in, upon, across, under, or over any lands, &c., roads, &c., such inclined planes, &c., bridges, &c., cuttings, &c., as they shall think proper; and also to divert or alter the course of any rivers, &c., roads or ways, or to raise or sink any such rivers, &c., roads or ways.

Sect. 73 prescribes the width, ascent, &c., of any bridge erected for carrying any public carriage road over the railway.

Stat. 7 *W.* 4. & 1 *Vict.* *c.* cii., local and personal, public, "to enable '*The Great North of England Railway Company*' to extend the line of their railway, and to make two branches therefrom; and for other purposes relating thereto," gives power to extend the railway, and enacts that all the powers, &c., regulations, &c., of the former act (except such as are expressly repealed &c.) shall extend to this act, and the works and things hereby authorized, and shall operate and be in force in respect to the objects and purposes of this act, and has a section (35) analogous to sect. 73 of the former act.

&c., divers large quantities of bricks, stones and lime, to wit 100 loads &c., in and upon the said highway; and the same part of the said highway so cut through, &c., and the said cut and trench so dug, &c., and the said bricks, &c., so cast, laid down, &c., as aforesaid, with force and arms then and there, unlawfully and injuriously, did keep, maintain and continue for a long space of time then next following, to wit &c. By means of which said several premises the said highway, on the said 3d day &c., and for and during all the time aforesaid, became and was obstructed and stopped up, so that the liege &c., on &c. and for and during all the time aforesaid, could not go, return, &c., as they ought &c.: to the great damage and common nuisance of all her Majesty's liege subjects going, &c. in through and along the Queen's common highway aforesaid: to the evil example &c., and against the peace &c. (not adding "against the statute").

The second count charged an offence in the same form as the first, except that no termini were stated.

The third count alleged the existence of a highway, and the cutting and digging it and making a trench across it, as stated in the first count, and then charged that the defendants also then and there, unlawfully and injuriously, did erect and build, in and upon the said last mentioned highway, a certain bridge, to wit a bridge of bricks, stones and other materials; and the same part of the said last mentioned highway so cut through, &c., and the said cut and trench so dug and made, and the said bridge so erected and built, as last aforesaid, with force and arms then and there, unlawfully and injuriously, did keep, maintain and continue for &c. (as in the first count).

4th count, like the third, but omitting the termini of the highway. There were five other counts, charging offences against the provisions of stats. 6 & 7 *W.* 4. *c.* cv. and 7 *W.* 4. & 1 *Vict. c.* cii.

Plea, Not guilty. Issue thereon.

On the trial, before *Wightman* J., at the *Durham* Spring assizes, 1845, evidence was given, on the part of the prosecution, to shew that the Company had cut through a carriage road with the railway, and had carried the road over the railway by a bridge not satisfying the statutory provisions. For the defendants, it was objected that no indictment for a misfeasance could be maintained against a corporation; and, as to the first four counts, that the defendants were authorised to cut through the road and erect the bridge, and that, if, in doing so, they had not complied with the statutory provisions, they ought to have been indicted for breach of those provisions (*a*). Other objections were taken to the last five counts, which it is unnecessary to state. A verdict was found for the Crown on all the counts, leave being reserved to move to enter a verdict for the defendants, or to arrest the judgment.

In *Easter* term, 1845, *Wortley* obtained a rule accordingly. In this term (*b*),

Granger, *Otter* and *Bovill* shewed cause. The prosecutors do not insist on the last five counts: the first four sufficiently raise the question, whether a corporation

(*a*) The argument, as to this point, in banc, is omitted in the report, the Court having pronounced no express decision upon it: *Regina* v. *Scott*, 3 *Q. B.* 543., was referred to.

(*b*) *Tuesday, May* 26th, and *Monday June* 8th. Before Lord *Denman* C. J., *Patteson* and *Wightman* Js.

aggregate can be indicted for a misfeasance. The diction of *Holt* C. J., in an *Anonymous* (*a*) case in *Modern Reports*, will be relied upon for the defendants. He is reported as saying: "A corporation is not indictable, but the particular members of it are." It does not appear what the facts there were, nor whether the indictment was for a misfeasance or a nonfeasance. [Lord *Denman* C. J. referred to *Regina* v. *Birmingham and Gloucester Railway Company* (*b*).] It was there held that a corporation might be indicted for not obeying a statute: and this was assumed in *Rex* v. *The Severn and Wye Railway Company* (*c*). These two cases, at least, shew that Lord *Holt*'s dictum, as reported, is not now law: and by the judgment delivered in the former the dictum is distinctly overruled. At one time it was doubted how a corporation could be brought into Chancery: and the process directed, on appeal, by the House of Lords appears in *Dr. Salmon* v. *The Hamborough Company* (*d*). It is not necessary for the prosecutors here to contend that an indictment would lie for any misfeasance involving a breach of the peace: a murder, for instance, could not be conceived to be authorised by the corporation seal. That is the distinction suggested in *Regina* v. *Birmingham and Gloucester Railway Company* (*b*), in the judgment of this Court, where *Hawk. P. C.* B. 1. *c.* 65. *s.* 13. (*e*) is cited. But for that which is analogous to a mere trespass on land an indictment may lie. The tendency of modern decisions has been to make corporations, civilly as well as criminally, amenable like individuals. Trespass quare clausum fregit was held to be maintainable against

(*a*) 12 *Mod.* 559. Case 935.
(*b*) 3 *Q. B.* 223.
(*c*) 2 *B. & Ald.* 646.
(*d*) 1 *Ca. Ch.* 204.
(*e*) Vol. ii. p. 58. 7th ed.

a corporation in *Maund* v. *The Monmouthshire Canal Company* (*a*); debt on statute, in *Tilson* v. *The Warwick Gas Light Company* (*b*); trover, in *Yarborough* v. *The Bank of England* (*c*) and *Smith* v. *The Birmingham Gas Company* (*d*); case for neglect to perform repairs, according to the terms of a charter, in *Henly* v. *The Mayor of Lyme* (*e*); case for neglect in performing works, in *Matthews* v. *West London Water Works Company* (*g*); case for not keeping clear the navigation of a canal in which the corporation had power to take tolls, in *The Lancaster Canal Company* v. *Parnaby* (*h*). And, in *Beverley* v. *The Lincoln Gas Light and Coke Company* (*i*) and *Church* v. *The Imperial Gas Light and Coke Company* (*k*), it was held that assumpsit, on a contract not under seal, might be maintained against and by a corporation. In the former of these two cases, the Court expressed a readiness to sanction any decisions which they found introducing a relaxation of "a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions." In *Church* v. *The Imperial Gas Light and Coke Company* (*k*) the Court said: "wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed." [*Patteson* J. Has not the movement recently been rather

(*a*) 4 *M. & G.* 452. (*b*) 4 *B. & C.* 962.

(*c*) 16 *East*, 6. (*d*) 1 *A. & E.* 526.

(*e*) 5 *Bing.* 91. Affirmed on error, in *Q. B. Mayor &c. of Lyme Regis* v. *Henley*, 3 *B. & Ad.* 77. In the House of Lords, *Same* v. *Same*, 1 *New Ca.* 222.

(*g*) 3 *Campb.* 403.

(*h*) 11 *A. & E.* 230, in *Ex. Ch.*; affirming the judgment of *Q. B.* in *Parnaby* v. *The Lancaster Canal Company*, 11 *A. & E.* 223.

(*i*) 6 *A. & E.* 829. (*k*) 6 *A. & E.* 846.

in the opposite direction (*a*)?] In *Hall* v. *The Mayor &c. of Swansea* (*b*) a corporation was held to be liable in assumpsit for money had and received. In *Mayor of Ludlow* v. *Charlton* (*c*) the Court of Exchequer said: "In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by act of parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." That is the doctrine of *Murray* v. *The East India Company* (*d*). Here the corporation is a railway company, with the ordinary powers (*e*) of interfering with roads on certain conditions; and the offence charged is peculiarly one likely to be committed in the performance of acts which the corporation may have occasion to do. No difficulty exists as to connecting them with such acts: *Rex* v. *Medley* (*g*) shews that members of a company, who authorise their servants to commit an act amounting to a nuisance, are liable to be indicted with such servants: it follows that the corporate body, which has the power of authorising an act under seal, is indictable

(*a*) See cases collected in *Paine* v. *Strand Union*, 8 *Q. B.* 326.
(*b*) 5 *Q. B.* 526. (*c*) 6 *M. & W.* 815.
(*d*) 5 *B. & Ald.* 204. 210.
(*e*) It is not thought necessary to set these out.
(*g*) 6 *C. & P.* 292.

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for such act, if it be a breach of the law. So a corporation may distrain wrongfully by their servant, *Smith* v. *The Birmingham Gas Company* (*a*). In *Rex* v. *Shelderton* (*b*) the inhabitants of a place were indicted for digging in a highway; but the point was not discussed. The common law punishment for a nuisance is fine, or imprisonment, or both. The first of these can be inflicted on a corporation. And the reasoning which the Court used in *Rex* v. *Trafford* (*c*) seems applicable. It was there said that an action on the case would have lain, and that it followed that an indictment lay. Here trespass would lie. [*Patteson* J. Judgment in that case was reversed on error in the Exchequer Chamber (*d*): it then was taken up to the House of Lords, but never determined.] The reversal was on the ground that the statements in the special verdict were insufficient: no objection was made to the test propounded in this Court. That which, if committed against an individual, would be ground for an action is ground for an indictment, if committed against the public. Reference may perhaps be made to *The Case of Sutton's Hospital* (*e*), where it is said that a corporation aggregate "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls." But that is met by the distinction already pointed out: no actual breach of the peace, perhaps, can be the subject of indictment against a corporation; nor can the judgment proper to treason or felony be executed upon them. But they can, by their servant, obstruct a highway, and may be fined for doing so, or may be compelled to

(*a*) 1 *A. & E.* 526. (*b*) 2 *Keb.* 221.
(*c*) 1 *B. & Ad.* 874. 886.
(*d*) *Trafford* v. *The King*, 8 *Bing.* 204.; *S. C.* 2 *Cro. & J.* 265.
(*e*) 10 *Rep.* 1 *a.* 32 *b.*

abate. The authorities cited establish the only two points necessary for supporting this indictment, namely, that the corporation may be reached by the appropriate criminal process, and that it may commit the act charged. A mandamus is, of course, inapplicable, where the complaint is of a positive act done.

Knowles, *Bliss and Joseph Addison*, contrà. Admitting, for the sake of the argument, that a corporation is liable to actions upon deeds under the corporate seal, for acts authorized to be done under the corporate seal, and for some acts of so ordinary a kind that they may be commanded without seal, and also that, according to *Regina* v. *Birmingham and Gloucester Railway Company* (*a*), a corporation may be indicted for a nonfeasance, it will not follow that an indictment lies against them for a misfeasance. The prosecutors' counsel, in this last case, distinguished expressly between a misfeasance and a nonfeasance, admitting that an indictment would not lie for the former; that distinction appears to be adopted by the Court; and there is good reason for it. For a nonfeasance there would be no other remedy, except in the cases where mandamus lies, inasmuch as the omission cannot be the omission of any particular individual: but, where an indictable act is done, the individual doing it may be indicted, and so may any individual members of the corporation who have given the illegal command. But suppose, after a corporation had been indicted for the act and punished, such individuals were indicted. Could they support a plea of autrefois convict by shewing the conviction of the corporation? Or are they to be punished twice, once as individuals, and once as members

(*a*) 3 *Q. B.* 223.

of the body corporate? It is admitted, on the other side, that the doctrine stated in *Hawkins*, and sanctioned by this Court in *Regina* v. *Birmingham and Gloucester Railway Company* (*a*), excludes cases of violence: and 6 *Vin. Abr.* 309, *Corporations* (Z), pl. 2. is to the same effect. Yet a road might be obstructed by violent means; and indeed it is impossible to charge an actual obstruction without alleging force; and it must be supported by proof of what is legally a species of violence. It may be questioned whether the liability of corporations to civil actions has not been extended too far. In *Maund* v. *The Monmouthshire Canal Company* (*b*), where it was held that trespass vi et armis might be brought against a corporation, the chief argument against the action seems to have been that the appropriate process could not be issued against a corporation; and reference was made to a citation, in *Bro. Abr. Corporations*, pl. 43., from 22 *Ass.* f. 100 B. pl. 67. This argument is strengthened by the circumstance that, before stat. 5 & 6 *W. & M. c.* 12., a fine was always imposed on the defendant in an action of trespass, for which the Court, ex officio, issued a capias (*c*): *Beecher's Case* (*d*). Replevin will not lie against a corporation, because they cannot distrain in their own persons; 2 *Bac. Abr.* 264. (7th ed.), tit. *Corporations* (E). A corporation, as such, cannot disseise; 2 *Bac. Abr.* 689. *Disseisin* (B). Nor, again, would it follow, from a civil action for trespass being maintainable, that an indictment for the same act is so. An injury committed out of the realm, an assault by an insane person, an assent to a trespass previously com-

(*a*) 3 *Q. B.* 232. (*b*) 4 *M. & G.* 452.
(*c*) See *Lyndsey* v. *Clerke*, 5 *Mod.* 285.
(*d*) 8 *Rep.* 58 *a.* 59 *b.*

mitted for the defendant's benefit, would be grounds for an action, but not for an indictment. The object of an action is to give the injured party compensation; that of an indictment, to inflict punishment, for the sake of example, upon acts injurious to the public.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with undisputed decisions, that an indictment may be maintained against a corporation for nonfeasance.

All the preliminary difficulties, as to the service and execution of process, the mode of appearing and pleading, and enforcing judgment, are by this admission swept away. But the argument is, that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence.

No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If *A.* is authorised to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

But, if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.

Some dicta occur in old cases: "A corporation cannot be guilty of treason or of felony." It might be added "of perjury, or offences against the person." The Court of Common Pleas lately held that a corporation might be sued in trespass (*a*); but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. The late case of *Regina* v. *Birmingham and Gloucester Railway Company* (*b*) was confined to the state of things then before the Court, which amounted to non-feasance only; but was by no means intended to deny the liability of a corporation for a misfeasance.

We are told that this remedy is not required, because the individuals who concur in voting the order, or in

(*a*) *Maund* v. *The Monmouthshire Canal Company*, 4 *M. & G.* 452.
(*b*) 3 *Q. B.* 223.

executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings.

The verdict for the Crown, therefore, on the first four counts, will remain undisturbed.

Judgment to be entered on the first four counts: arrested on the others.

END OF TRINITY TERM.

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1846.

[*Thursday, February* 12th, 1846 (*a*).]

Doe on the demise of William Angell *against* Benedict John Angell Angell.

Although the general rule is, that, to take by purchase under a devise to the male heirs of *W.*, the taker must be both a male and very heir, yet such rule may be controuled where the rest of the devise shews that the devisor intends to give the preference to a male descendant of *W.*, tracing his descent entirely through males, over a descendant, male or female, who should be heir general of *W.* but not trace a descent entirely through males: and the descendant, so apparently preferred, will take to the exclusion of the heirs general of *W.* and of the devisor.

As where, to the words "male heirs of *W.*," was added "if any such there be," and the rest of the devise shewed that the devisor knew that the heir general of *W.*, who traced through a female, was a male, and yet a remainder was limited over to him upon failure of male heirs of *W.*; and the devisor added that the males were to take place first, as long as there were any, through every descent; and also added, to the words of purchase "male heirs of *W.*, if any such there be," the words of limitation "and their male heirs for ever."

J., seised in fee, leased for sixty one years, for a term expiring in 1837, within five years after the passing of stat. 3 & 4 *W.* 4. *c.* 27. (24th *July* 1833). From *J.*'s death, which happened more than twenty years before the passing of the act, *B.* received the rent reserved on the lease, down to its expiration; and he then entered into possession: and afterwards *W.*, within five years after the passing of the act, brought ejectment against *B.*, claiming to be entitled, as *J.*'s devisee, immediately on *J.*'s death.

Held that, under sect. 2, the action would have been barred by *B.*'s receipt of the rent; but that it was preserved by sect. 15 for five years after the passing of the act.

EJECTMENT for land in *Surrey*.

On the trial, before *Tindal* C. J., at the *Surrey* summer assizes, 1843, it appeared that *John Angell* had died seised in fee of the land in 1784. The property was then under lease from the devisor to one *Weston* for a term of sixty one years, which expired at *Michaelmas* 1837. The lessor of the plaintiff claimed under the will of the said *John Angell*, and commenced this action of ejectment in the year 1837, immediately after the expiration of the lease, and within five years after the passing of stat. 3 & 4 *W.* 4. *c.* 27 (*b*). The material part of the will was as follows.

"In the name of God, Amen. *September* the 21st 1774. I, *John Angell*, of" &c. "*Item:* I give to the male heirs, if any such there be, of *William Angell*, the first

(*a*) The publication of this report has been unavoidably postponed.

(*b*) Royal Assent, 24th *July*, 1833.

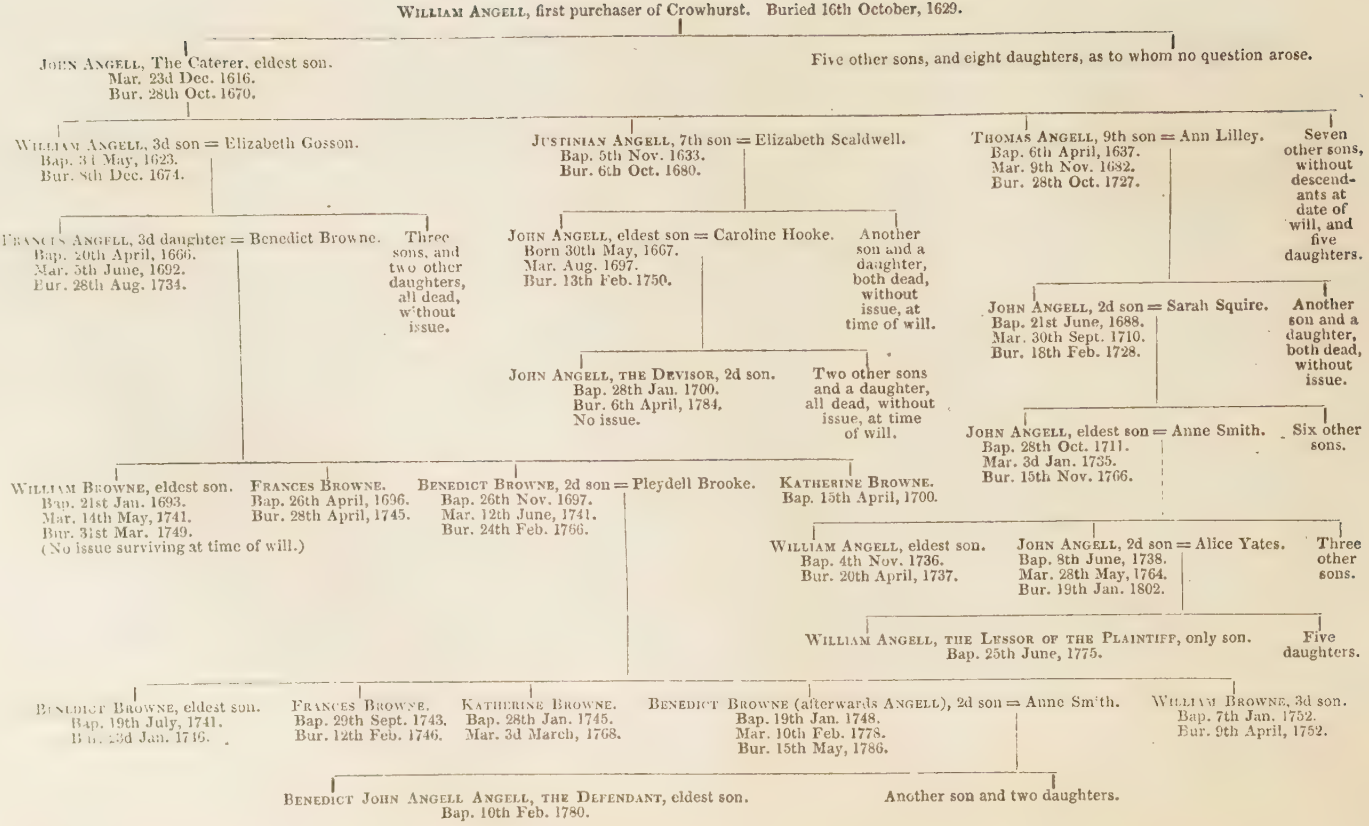
purchaser at *Crowhurst*, and father of my great grandfather, *John Angell* Esquire, and their male heirs for ever, all my lands and estates, both real and personal, in *Surrey*, *Kent* and *Sussex*; nevertheless, subject and liable to such conditions as shall be hereafter mentioned, and shall not be otherwise disposed of and given. And, if there be no male heirs or descendants of the same *William*, then I give those estates, as specified, to the male heirs of *William*, or the first *Angell*, of *Northamptonshire*, in order as they shall be found or made apparent. And, if there be none of those in being, or that shall be apparent, and plainly and legally make themselves out to be *Angells*, and so related and descended, I then give all my estates whatsoever, both real and personal, to *William* (*a*) *Browne* Esquire, grandson to Mrs. *Frances*, the wife of *Benedick Browne* Esquire, who was an *Angell*, and to his male heirs for ever, excepting the issue of his aunt *Katherine*, who flung herself away in marriage; notwithstanding, under such conditions, and with such restrictions and engagements, and liable to such settlements and enfeoffments, as I shall here, or at any time or any way hereafter, make them subject to. And I desire notice may be taken that, in all these givings, my meaning is that the estates shall never be divided, but always be in one hand, and the males to take place first, so long as there are any, through every descent. Whosoever is in possession of them, if they be not *Angells*, shall alter their names to *Angell*, and always write and call themselves by that name, without any alias or addition of any other name; and they shall always bear the

(*a*) See post, p. 336., note (*d*).

Angells' arms, with all their quarterings, and no other. And, if it shall so fall out that the heirs of the *Brownes* should cease and fail, then my will is that the male heirs of my great aunt *Marriott* (*a*) shall successively take place, the males first, and be entitled to the aforesaid estates. And, on failure of the *Maryotts* (*b*), they shall descend to the male heirs of Doctor *Lucy*, Bishop of *St. David's*, if any he had, by *Martha* his wife, my great aunt, second daughter to my great grandmother; and, in default of the *Lucys*, then to the male heirs of my great aunt *Hocknall*; and afterwards to my right heirs, whosoever they shall be, in the male line. And my will is that, if any *Browne*, or any other person, to whom these estates should come, offer to pawn, or sell, or mortgage any part of them, on manifestation (*c*) proof thereof, the next in succession shall immediately be entitled to and take possession of the whole; and the same shall be if they do not forthwith alter their names as required, or if they should in anywise contest in law or offer to oppose this my will, especially in regard to the copyhold estate in *Lambeth*, or neglect or be deficient in the performance of what I desire in it." "*John Angell* (L.S.). *September* 26th, 1775. Signed and sealed," &c. (Attestation.)

The lessor of the plaintiff claimed as the heir male of *William Angell*, the first purchaser of *Crowhurst*, and offered evidence by which he traced his descent, entirely through males, from *Thomas*, the ninth son (sixth of those who survived their father) of *John Angell*, called *The Caterer*, who was the eldest son of *William*, the first purchaser of *Crowhurst*, according to the following pedigree.

(*a*) Sic. (*b*) Sic.
(*c*) Sic.


William Angell, first purchaser of Crowhurst. Buried 16th October, 1629.
John Angell, The Caterer, eldest son. Mar. 23d Dec. 1616. Bur. 28th Oct. 1670.
Five other sons, and eight daughters, as to whom no question arose.
William Angell, 3d son = Elizabeth Gosson. Bap. 31 May, 1623. Bur. 8th Dec. 1674.
Justinian Angell, 7th son = Elizabeth Scaldwell. Bap. 5th Nov. 1633. Bur. 6th Oct. 1680.
Thomas Angell, 9th son = Ann Lilley. Bap. 6th April, 1637. Mar. 9th Nov. 1682. Bur. 28th Oct. 1727.
Seven other sons, without descendants at date of will, and five daughters.
Frances Angell, 3d daughter = Benedict Browne. Bap. 20th April, 1666. Mar. 5th June, 1692. Bur. 28th Aug. 1734.
Three sons, and two other daughters, all dead, without issue.
John Angell, eldest son = Caroline Hooke. Born 30th May, 1667. Mar. Aug. 1697. Bur. 13th Feb. 1750.
Another son and a daughter, both dead, without issue, at time of will.
John Angell, 2d son = Sarah Squire. Bap. 21st June, 1688. Mar. 30th Sept. 1710. Bur. 18th Feb. 1728.
Another son and a daughter, both dead, without issue.
John Angell, the Devisor, 2d son. Bap. 28th Jan. 1700. Bur. 6th April, 1784. No issue.
Two other sons and a daughter, all dead, without issue, at time of will.
John Angell, eldest son = Anne Smith. Bap. 28th Oct. 1711. Mar. 3d Jan. 1735. Bur. 15th Nov. 1766.
Six other sons.
William Browne, eldest son. Bap. 21st Jan. 1693. Mar. 14th May, 1741. Bur. 31st Mar. 1749. (No issue surviving at time of will.)
Frances Browne. Bap. 26th April, 1696. Bur. 28th April, 1745.
Benedict Browne, 2d son = Pleydell Brooke. Bap. 26th Nov. 1697. Mar. 12th June, 1741. Bur. 24th Feb. 1766.
Katherine Browne. Bap. 15th April, 1700.
William Angell, eldest son. Bap. 4th Nov. 1736. Bur. 20th April, 1737.
John Angell, 2d son = Alice Yates. Bap. 8th June, 1738. Mar. 28th May, 1764. Bur. 19th Jan. 1802.
Three other sons.
William Angell, the Lessor of the Plaintiff, only son. Bap. 25th June, 1775.
Five daughters.
Benedict Browne, eldest son. Bap. 19th July, 1741. Bur. 23d Jan. 1746.
Frances Browne. Bap. 29th Sept. 1743. Bur. 12th Feb. 1746.
Katherine Browne. Bap. 28th Jan. 1745. Mar. 3d March, 1768.
Benedict Browne (afterwards Angell), 2d son = Anne Smith. Bap. 19th Jan. 1748. Mar. 10th Feb. 1778. Bur. 15th May, 1786.
William Browne, 3d son. Bap. 7th Jan. 1752. Bur. 9th April, 1752.
Benedict John Angell Angell, the Defendant, eldest son. Bap. 10th Feb. 1780.
Another son and two daughters.

The defendant was, as appears by this pedigree, the heir general of the devisor, and also of *William Angell*, the first purchaser of *Crowhurst*, tracing his descent through a female, *Frances Browne*, the daughter of *William Angell*, third son of *John The Caterer*. Upon the devisor's death, in 1784, the father of the defendant had entered into possession of the estates, and changed his name to *Angell*, and had received the rent of the land in question, reserved by the lease, until his death in 1786, from which time the rent was received by the present defendant until the expiration of the lease in 1837, and he thenceforth continued in possession of the property till the commencement of the action.

It was contended, on behalf of the defendant, that, supposing the pedigree of the lessor of the plaintiff to be established, he must still fail, as, first, under the words of the will, it was necessary that a person claiming as heir male should be heir general to *William*, the first purchaser, as well as male; and, secondly, the remedy was barred by stat. 3 & 4 *W.* 4. *c.* 27. *s.* 9. The defendant also denied that the lessor of the plaintiff had proved his descent. Leave was reserved to move to enter a nonsuit on the points of law; and the case was left to the jury on the facts. Verdict for plaintiff.

In *Michaelmas* Term, 1843, *Thesiger* obtained a rule nisi for a nonsuit, or for a new trial on the ground that the verdict was against the evidence.

Shee Serjt., *Petersdorff* and *Bovill* shewed cause (*a*). First, as to the effect of the devise. The will contains a

(*a*) The argument on the points of law, reported in the text, was heard in *Trinity* and *Michaelmas* terms (*June* 8th and *November* 14th and 18th), 1844, by Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

clear special designation of an heir male, other than the heir general: he must be a male descendant claiming through a succession of male heirs. The person so designated was *John Angell*, the father of the lessor of the plaintiff. The case on the other side rests on the doctrine in *Co. Lit.* 24. b., where the diversity between a descent and a purchase is illustrated as follows. "When a man giveth lands to a man and the heirs females of his body, and" [the man to whom the gift is made] "dieth, having issue a son and a daughter, the daughter shall inherit; for the will of the donor (the statute working with it) shall be observed. But in case of a purchase it is otherwise: for if *A.* have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of *A. A.* dieth, the heir female can take nothing, because she is not heir; for she must be both heir and heir female, which she is not, because the brother is heir, and therefore the will of the giver cannot be observed, because here is no gift, and therefore the statute cannot work thereupon. And so it is if a man hath a son and a daughter, and dieth, and lands be given to the daughter, and the heirs females of the body of her father, the daughter shall take nothing but an estate for life, because there is no such person, she being not heir. But where a gift is made to a man,

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In *Michaelmas* term (*November* 17th), 1845, before Lord *Denman* C. J., *Patteson* and *Williams* Js., the case was argued as to the facts, when *Shee* Serjt., *Petersdorff* and *Bovill* shewed cause against the rule; and the Court (stopping Sir *F. Thesiger*, Attorney General, *Channell* Serjt. and *Peacock*, contrà) said, that there must be a new trial on payment of costs. Sir *F. Thesiger*, Attorney General, then prayed for the judgment of the Court on the points of law; and the case stood over to *Hilary* vacation (*February* 12th), 1846; when judgment was delivered as after stated, p. 350.

and to the heirs female of his body, there the donee being the first taker is capable by purchase, and the heir female by descent, secundum formam doni: and therefore *Littleton* purposely added these words, *who ought to inherit*." But the text of *Littleton*, on which Lord *Coke* is commenting, sect. 22, does not warrant this limited interpretation. In *Hargrave*'s note (3) on this passage, though the general doctrine stated by Lord *Coke* is supported, it is admitted that an exception prevails where there are grounds for inferring a special designation. And there are such grounds in this will. It is true that Lord *Coke*'s doctrine was supported up to 1722; *Counden* v. *Clerke* (*a*), *Ashenhurst's Case* (*b*) there cited, *Southcott* v. *Stowell* (*c*), *Starling* v. *Ettrick* (*d*), *Lord Ossulston's Case* (*e*), *Dawes* v. *Ferrers* (*g*), in 1722. But other cases, some much later than 1722, have established, in opposition to *Coke*'s doctrine, that a limitation to the heirs special of the body by purchase will take effect in favour of the designated heir of the body, though he or she be not the heir general. *Pibus* v. *Mitford* (*h*) is a decision to that effect, in 26 *C.* 2. In *Boreman* v. *Yeat* (*i*) (12 *C.* 2.) the son of a second wife was allowed to take under a limitation to heirs male by the second wife, though he was not strictly heir (there being a son of the first wife), because the settlement appeared to be made as a provision for the issue of the two marriages. In *Baker* v. *Wall* (*k*) (A. D. 1697) a devise was to devisor's eldest son *D.* and his heirs male

(*a*) *Hob.* 29. 31. (5th ed.); *S. C. Moore*, 860.
(*b*) *Hob.* 34.
(*c*) *Freem. C. B.* 216. 225.
(*d*) *Prec. Ch.* 54.
(*e*) 3 *Salk.* 336.
(*g*) 2 *P. Wms.* 1.
(*h*) 1 *Vent.* 372. 381.
(*i*) 1 *Ca. Ch.* 145. (cited in *Davy* v. *Davy*).
(*k*) 1 *Ld. Raym.* 185.: *S. C.* cited in 1 *Str.* 41.

for ever; if a female, his next heir should allow her an annuity out of the lands, and hold the rest to him and his heirs male for ever: and the heir general, being a female, was excluded, because the will implied that by heir male was meant a special kind of heir other than the heir general. In *Brown* v. *Barkham* (*a*) (A. D. 1716) Lord *Cowper* held clearly that, under a devise to the heirs male of the body of the devisor's great grandfather, a male descendant of a younger son could take, though the daughter of an elder son was heir general: and, instead of founding his decree on special circumstances, he expressly denied Lord *Coke*'s proposition. In *Wills* v. *Palmer* (*b*) (A. D. 1770), under a settlement to the heirs male of the body of the settlor, his son by a second wife was held to be entitled in preference to the heir general, the daughter of a deceased elder son. In *Goodtitle dem. Weston* v. *Burtenshaw* (*c*) (A. D. 1772) an estate was settled, after the decease of *N.* and his intended wife, to the first and other sons of the marriage in tail male, and, after certain other limitations which failed, to the heirs female of the marriage and her or their heirs: there were three sons of the marriage; two died without issue; the third left a son, who died, leaving a daughter and only child. There were six daughters of the marriage, all of whom died except one, who was the wife of the lessor of the plaintiff: the defendant claimed under a purchase from the daughter of the surviving son, who was *N.*'s grand-

(*a*) 1 *Str.* 35; *S. C. Prec. Ch.* 442. 461; and, as *Newcomen* v. *Barkham*, 2 *Vern.* 729., 1 *Eq. Ca. Abr.* 215.

(*b*) 5 *Bur.* 2615.

(*c*) *Fearne's Cont. Rem.* 570. Appendix, No. I.

daughter and heir at law. It was objected that the wife of the lessor of the plaintiff was not the very heir, but the grand-daughter was heir, and therefore the former did not answer to the description of heir female in toto: but this objection was clearly overruled.

In all these cases the heir specially designated was held entitled, though not heir general. At the time of the writing of *Hargrave*'s note they had not been all decided: and, in a note, (2), to *Co. Litt.* 164. a., he says, after referring to the former note: "Since the writing of that note, a case has been published, in which the Court of King's Bench, after three arguments, decided against applying the rule to a will"; and he then refers to *Wills* v. *Palmer* (*a*). *Coke's* doctrine is also considered by the text writers to be now over-ruled; 2 *Jarman on Wills*, 7—9, *Burton's Elementary Compendium*, 253, (6th ed.), 1 *Roberts on Wills*, 426, 427 (3rd ed.), 1 *Powell on Devises*, 319, &c. (3d ed.). Lord *Cowper's* decree in *Brown* v. *Barkham* (*b*) was afterwards confirmed by Lord *Hardwicke*; *Newcoman* v. *Bethlem Hospital* (*c*).

It is clear in the present case, from the whole of the will, that the devisor meant to prefer such a particular male heir as he describes to any other. He assumes the existence of a descendant (*d*) of Mrs. *Browne*, who was an *Angell*; yet he overlooks her issue: he must have known that such descendant was heir general; and, had

(*a*) 5 *Burr.* 2615.

(*b*) 1 *Str.* 35; *S. C. Prec. Ch.* 442. 461; and, as *Newcomen* v. *Barkham*, 2 *Vern.* 729, 1 *Eq. Ca. Abr.* 215.

(*c*) *Ambl.* 8.

(*d*) Called in the will *William Browne*. *William Browne*, however, (according to the pedigree) died some years before the first making of the will; and the only grandchild of Mrs. *Frances Browne* then alive was *Benedict*, the defendant's father.

he not understood that the heir general was superseded by the heir specially designated, he would not have devised the estates to that heir in remainder, inasmuch as he would have them as heir at law. The devisor directs that the estate shall "always be in one hand": but this might be defeated if they went to females: and he accordingly endeavours to prevent parceners from taking, by exhausting the male heirs. [*Coleridge* J. Might it not be said, on the other hand, that this shewed his apprehension that the estates might come to a female under the earlier words of the devise?] The issue of *Katherine*, the aunt of the then heir general, are never to take till after the *Brownes*. The devise of the remainder to heirs male must be construed as pointing to heirs male of the body; Lord *Ossulston's Case* (*a*). Here is a special exclusion, to carry which into effect the devisor gives to relations of whose existence he did not know. He had one object, namely, that the taker of the estates should be male heir and special heir. [*Coleridge* J. What meaning has "descendants"?] It means persons descended through males. In devises the ordinary interpretation will be given: and all the expressions here point to persons of the male line. Thus: "the males to take place first, so long as there are any, through every descent": in which there is no ambiguity. It may therefore be argued that such words as are used in this will are not contemplated by *Coke:* and therefore it is scarcely necessary to controvert his general doctrine. The introduction of the words "heirs male of the body" would make no difference; "heirs male" simply would have the same effect; 2 *Powell on Dev.* 423. 3d ed. This agrees with the view taken in

(*a*) 3 *Salk.* 336.

Bernal v. *Bernal* (*a*). Where a devise is to male heirs, it is to a class, and the party takes an estate tail passing through the male line. If this language makes land go through the male line, why should not the same language make it come through the male line? In *Oddie* v. *Woodford* (*b*) it was held that the designation "eldest and every other male lineal descendant" was inapplicable to a male claiming in part through a female.

Secondly, even assuming it to be rightly objected that the lessor of the plaintiff has not twenty years from the expiration of the lease to bring his action, he is within the protection of stat. 3 & 4 *W.* 4. *c.* 27. *s.* 15.

But it may be questioned whether the protection of sect. 15 is wanted at all. The twenty years may run, not from 1784, when the defendant's father first received the rent, but from the expiration of the lease in 1837. If this be not so, in cases where such a lease expires just after the act the rightful claimant will be barred, but not where it expires just before; a consequence surely not intended. Sect. 2 overrides the whole act. The word "rent" there does not include rents reserved on leases for years, but is confined to rents existing as inheritances, distinct from the land, and for which, before the statute, an assize would lie; *Paget* v. *Foley* (*c*), *Grant* v. *Ellis* (*d*). *Doe dem. Davy* v. *Oxenham* (*e*) decided that neglect to receive the rents reserved on a term does not bar the right of the reversioner to recover in ejectment within twenty years of the expiration of

(*a*) 3 *Myln. & C.* 559. (*b*) 3 *Myln. & C.* 584.

(*c*) 2 *New Ca.* 679. 688.

(*d*) 9 *M. & W.* 113. See *Dean & Chapter of Ely* v. *Cash*, 15 *M. & W.* 617.

(*e*) 7 *M. & W.* 131.

the term. Sect. 5 taken alone will give the lessor of the plaintiff, who claims as reversioner expectant on the determination of the lease, twenty years from such determination. Sect. 7 is prospective only; *Doe dem. Evans* v. *Page* (*a*). In sect. 8 the receipt of rent clearly means the receipt of rent-charge; else it could not be received by a tenant at will. Then, assuming that sect. 9 applies to this case, it is important to observe that, at the time when the statute passed, if a lease were subsisting, the right of entry was preserved until the determination of the lease; *Orrell* v. *Maddox* (*b*): and the adverse receipt of rent for more than twenty years, during the continuance of the lease, did not deprive the party of his right of entry upon its determination, *Doe dem. Cook* v. *Danvers* (*c*): the possession of the lessee constituted a seisin by the party entitled to the reversion; *Bushby* v. *Dixon* (*d*). This state of the law is adverted to in the *First Report* of the Commissioners on the Law of Real Property, p. 47. "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are denied is virtually dispossessed. Where no rent, or only a nominal rent, is reserved, very slight negligence can

(*a*) 5 *Q. B.* 767.
(*b*) *Runnington on Ejectment*, 57. (2nd ed.)
(*c*) 7 *East*, 299, 321. (*d*) 3 *B. & C.* 298.

be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than twenty shillings a year may for this purpose be considered nominal." Sect. 9 was introduced with the intention of carrying out this view, and was to operate immediately on the statute passing. Sect. 14 points out a means of protecting claimants in future: but, in order to avoid the hardship upon reversioners at the time of the act passing, sect. 15 is introduced, which preserves the right in this and similar cases, the present action being commenced within the limited period of five years from the passing of the act. It rather seems that the meaning of "rent," in the earlier part of sect. 15, is the same as in sect. 2; that is, a distinct inheritance. "Profits" may refer to equitable profits: but, upon the most extensive construction of the word "rent," the plaintiff is clearly protected; for there was not, as the law stood before the act, a receipt of rent adverse to the reversioner; and the term "adverse" is decided to have been used with reference to the law as it stood when the act passed; *Nepean* v. *Doe dem. Knight* (*a*), *Doe dem. Jones* v. *Williams* (*b*), *Lessee O'Sullivan* v. *McSwiney* (*c*), *Lord Shannon* v. *Hodder* (*d*). Here, therefore, the receipt of rent was not adverse to the lessor of the plaintiff in the sense of sect. 15; the same hardship will follow from an opposite construction as would have followed in *Doe dem. Evans* v.

(*a*) 2 *M. & W.* 894. 911, 912. (*b*) 5 *A. & E.* 291.
(*c*) *Longfield & Townshend's Irish Exch. Rep.* 111. 119.
(*d*) 2 *Brady, Adair & Moore's Irish Law Rep.* 223.

Page (*a*), from holding sect. 7 to be other than prospective. [*Patteson* J. The word "interest" in the latter part of sect. 15 seems to be a mistake for "rent."] A man who has rent issuing out of land has an interest. [*Patteson* J. He does not "recover" interest. Lord *Denman* C. J. Suppose I am wrongfully in possession for fifteen years, and, six years before the passing of the act, I make a lease which has not expired when the act passes: then, though I should have held for twenty years, has the rightful owner still five years from the passing of the act?] He has. [*Coleridge* J. If I had not made the lease, twenty years would have expired, and the possession would be adverse; yet you admit that possession under the lease is possession of the landlord.] Of the rightful landlord. [*Coleridge* J. If "rent" is used for a rent reserved in a lease, in what case can any receipt of rent be adverse? *Patteson* J. If my tenant under a lease paid to a stranger, I might, under the old law, treat that as a forfeiture, or wait till the lease expired: but now, by sect. 9, payment to any other is an adverse possession by such other; and if I wait I lose my action.] That is exactly the case which sect. 15 was meant to provide for. If sect. 9 applies, so does sect. 15, which clearly was inserted to prevent sect. 9 from working hardship. If sect. 15 does not apply, neither does sect. 9.

Sir *F. Thesiger*, Solicitor General, *Channell* Serjt., *Platt*, *Humphry* and *Peacock*, contrà. First: by the words "male heirs," with the superadded words of limitation "their male heirs for ever," the testator

(*a*) 5 *Q. B.* 767.

meant the person who should answer the character of heir and male, that is, *very* heir and male. It is admitted that, if the construction were to be on these words as words of limitation, occurring in a deed, the word "male" must be rejected, and the estate would be a fee; *Co. Litt.* 27. a. But, in a devise, the law in general will superadd to the words "heirs male," used only as words of limitation, the words "of the body;" *Lord Ossulston's Case* (*a*), *Co. Litt.* 27. a.; yet, even in such case, if the other parts of the will shew that the devisor did not mean to restrict the descent to heirs of the body, the law will not violate the intention by importing "heirs of the body," but rather will reject the term "male" as in a deed, to effect the general intention. Here, however, the words are of purchase, and not limitation simply, but with similar words of limitation superadded: and it is contended, on the other side, that the law construes this limitation as "heirs of the body," and that the words of purchase are to be construed in the same way, and that therefore "heirs male" must be "heirs male of the body."

There is a clear distinction between heirs male of the body claiming by descent, and as purchasers: the former must take entirely through males; the latter need not. And, to take as heir male of the body by purchase, the taker must be both heir of the body and actual heir. So, according to the passage cited on the other side from *Co. Litt.* 24. b., a person must be both heir and female to take by purchase under the words in a devise to heirs female of the body. This view is supported in *Hargrave's* note. The rule was generally considered to have been contradicted by *Brown* v.

(*a*) 3 *Salk.* 336.

Barkham (*a*), where Lord Chancellor *Cowper* denied the distinction between descent and purchase so far as it applied to a limitation in which the body out of which the heir was to come was particularly mentioned or described; but Lord *Hardwicke*, upon a bill of review, in *Newcoman* v. *Bethlem Hospital* (*b*), admitted Lord *Coke's* doctrine, and professed to decide on special circumstances; note (3) to *Co. Litt.* 24. b. Lord *Cowper's* opinion was confirmed by this Court in *Wills* v. *Palmer* (*c*) and *Goodtitle dem. Weston* v. *Burtenshaw* (*d*), so far as to allow special circumstances to control the general rule: but even this qualification of the general rule has been disputed; *Chambers* v. *Taylor* (*e*).

But, if the rule be impeached to this extent, the only consequence will be that recourse must be had to the principle of that class of cases, noticed in *Fearne's Cont. R.* p. 213., in which it has been held that, if the testator shew by express words, or if it must necessarily be inferred, that he meant a person to take as particular heir, who was not general heir, his intention will be carried into execution. Thus, such intention may be inferred, if a man give land in borough English to the heir of his land in borough English, as in the case put in *Counden* v. *Clerke* (*g*). Or the case cited in *Pibus* v. *Mitford* (*h*) (and mentioned by *Hargrave* as one of those opposed to Lord *Coke's* doctrine), where a man, having three daughters and a nephew, gave his daughters 2000*l.*, and gave the land to his heir male, provided that, if his daughters

(*a*) 1 *Str.* 35.; *S. C. Prec. Ch.* 442. 461.; and, as *Newcomen* v. *Barkham*, 2 *Vern.* 729., 1 *Eq. Ca. Abr.* 215.

(*b*) *Ambl.* 8.

(*c*) 5 *Bur.* 2615.

(*d*) *Fearne's Cont. R.* 570. Appendix, No. 1.

(*e*) 2 *Myln. & C.* 376. 381, 385.

(*g*) *Hob.* 29. 34. (5th ed.)

(*h*) 1 *Vent.* 381.

troubled his heir, then the devise of the 2000*l.* should be void. *Baker* v. *Wall* (*a*) is a similar case. There a testator devised *Dumsey* to *D.*, his eldest son, "to him and his heirs males for ever, if a female, my next heir shall allow and pay to her 200*l.* in money or 12*l.* a year out of the rents and profits of *Dumsey*, and shall have all the rest to himself, I mean my next heir, to him and his heirs male, for ever." And the Court said that, if a party take notice that he has a right heir, and specially exclude him, and then devise to another by the name of heir, this shall be a special heir to take. To these may be added the cases where the testator takes notice that by the word "heir" he means some one whose ancestor is living. Such are *James* v. *Richardson* (*b*) and *Darbison dem. Long* v. *Beaumont* (*c*). But there is no case where the words "heirs male," standing alone and unexplained, as words of purchase, have been held to exclude the heir general, or, in other words, where the law has supplied, against such heir, in favour of a purchaser, the words "of the body." *Coke*'s rule has been repeatedly recognised; and, even where it has been qualified, its validity, as applicable to such a general description, has been admitted; *Ashenhurst's Case* (*d*), 2 *Rol. Abr.* 416, tit. *Remainder*, (F) pl. 5., *Counden* v. *Clerke* (*e*), *Starling* v. *Ettrick* (*g*), *Dawes* v. *Ferrars* (*h*), *Wills* v. *Palmer* (*i*). *Bayley* J., in *Doe dem. Winter* v. *Perratt* (*k*), goes through the cases, and clearly

(*a*) 1 *Ld. Raym.* 185.

(*b*) 2 (*T.*) *Jones*, 99.; *T. Raym.* 330.; 1 *Vent.* 334. See *Burchett* v. *Durdant*, 2 *Vent.* 311.

(*c*) 1 *P. Wms.* 229.

(*d*) Cited *Hob.* 34.

(*e*) *Hob.* 29. 31.; *S. C. Moore*, 860.

(*g*) *Prec. Ch.* 54.

(*h*) 2 *P. Wms.* 1.

(*i*) 5 *Bur.* 2626.

(*k*) 5 *B. & C.* 48. 93. Affirmed in *Dom. Proc.*; *Doe dem. Winter* v. *Perratt*, 10 *Bing.* 198., 6 *M. & G.* 314. *S. C.* 9 *Cl. & Fin.* 606.

understands the general rule to be as now contended for by the defendant. The same principle is adopted in the judgments of *Taunton* and *Bosanquet* Js. in *Doe dem. Winter* v. *Perratt* (*a*) in the House of Lords.

As to the evidence furnished, in this case, of the devisor's intent, the words of limitation are to be looked at; and it is therefore important to ascertain whether the testator could by possibility have meant "heirs male of the body." In the expression "if there be no male heirs or descendants," "descendants" could not mean the same thing as "male heirs:" in its technical sense, the word "descendants" includes collateral as well as lineal heirs: it comprehends those who take by descent in contradistinction from those who take by purchase. But, from the subsequent devise, by the same words "his male heirs for ever," to *William Browne*, the devisor excepts "the issue" of the aunt *Katherine*: the words therefore clearly are not intended to describe an estate in tail male, but a fee simple, since there would otherwise be no reason for the exception. The same construction must apply to the same words in the first part of the devise. In the later words are directions which would be superfluous if the estate was to descend only through males. "In all these givings, my meaning is that the estates shall never be divided, but always be in one hand, and the males to take place first, so long as there are any, through every descent"; and "whosoever is in possession of them, if they be not *Angells*, shall alter their names," &c. There is a gift over to the *Marriotts*, if the "heirs" of the *Brownes* shall cease. Generally, therefore, the testator contem-

(*a*) 9 *Cl. & Fin.* 606. 617. 625.

plates that a claim might be made through females under the limitations to "male heirs for ever." Stress has been laid upon the supposed acquaintance of the devisor with the state of the descendants of *John The Caterer*. But there is no evidence that he knew his own pedigree: the will rather shews that he was ignorant of it. The case, therefore, resembles *Pearce* v. *Vincent* (*a*), where the ignorance of the testator, as to the person to take under a particular limitation, was held important, as excluding an inference supposed to arise from the particular position of that party. If the devisor was ignorant of the state of his family, there can be no presumption of intention at all. The Court must be in the same condition as the devisor with respect to knowledge. [*Patteson*, J. That is so.] If the devisor had known his pedigree he would not have dealt in such general terms as "if any such there be." In using the expression "male heirs" he was either struggling to express what the law would have effected without any direction, that males should be preferred to females in every descent, or to alter the legal mode of descent, which he could not do; *Co. Litt.* 27. a., b. It is not improbable, from these expressions, that he meant to give a fee to the person who should answer the description of male heir of *William Angell*, the purchaser of *Crowhurst*, and that he used these words to signify heirs of the male sex. The gifts were not intended by way of remainder upon each other, but are alternative gifts, that is, to one sot of heir, if he can be found, and, if not, to another. A all events no stress can be laid upon the words as

(*a*) 2 *Keen*, 230.

limiting the words of purchase to heirs of the body. This consideration is important, because a distinction exists as to the effect of words of purchase, where the description is "heirs of the body," and where it is "heirs male" generally. Here the words "heirs male" are repeated each time, and are clearly words of limitation, added upon the words of purchase. Now, where an estate is given to "male heirs" by will, it means "of the body," because a gift to heirs would be a fee. That is the general ground of the interpretation in such cases: but this makes it requisite to examine the particular dispositions in the present case, for the purpose of discovering whether such an inference arises here. The general rule is to give effect to all words of a will. If the first words, "male heirs," are construed as male heirs of the body, the second words, "their male heirs for ever," are inoperative altogether. If the words mean male heirs of the body, *Mandeville's Case* (*a*) shews that, if *William Angell* of *Crowhurst* had had two sons, the eldest son would have taken, but, if the eldest son had died without issue, it would have gone to his brother, the second son of *William*, heir of the body of *William*, though not heir of the body of the eldest son of *William*. Therefore, if the first words be held to mean heirs of the body of *William*, then the estate would go, after *William*'s death, as if entailed on *William*; whereas the words which follow shew that this was not the meaning of the devisor. Now the lessor of the plaintiff can be entitled only by supposing that "male heirs of *William Angell*" means "male heirs of the body of *William*."

It may, at the least, be contended that the devise was

(*a*) *Co. Lit.* 26. b.

void for uncertainty. That was a ground upon which some of the judges proceeded in *Doe dem. Winter* v. *Perratt* (*a*): and it is discussed by Lord *Eldon* in *Oddie* v. *Woodford* (*b*). Or it may be considered that the devisor's mind was vacillating. [*Coleridge* J. Then his last expression prevails. *Patteson* J. If "male heirs" mean any heirs, why should he say "if any such there be?"]. It may also be asked, if he means males, why it is afterwards said that males are to take before females, or the issue of the aunt *Katherine?* Therefore the rule applies, that, where the devise is unexplained or unqualified, the words must be construed in their primary sense; 1 *Powell on Dev.*, 312, 313. Here, then, the word "heirs" must primâ facie be applied in its primary sense. *Withy* v. *Mangles* (*c*) illustrates the general rule, that words must have their legal effect, even though there be strong ground for suspecting that the devisor used them in ignorance of the principle upon which they would be construed.

There are, then, three points of construction in favour of the defendant. 1. The devise describes, not the heirs of the body, but the person answering the description of male heir: and then he must be very heir: or, 2. Suppose the words to be construed as heirs male of the body, as words of purchase, the defendant's father, who was both heir of the body and male, would be entitled: or, 3. The devise was void for uncertainty, and the defendant is entitled as heir at law.

Secondly, the remedy is barred by stat. 3 & 4 *W.* 4. *c.* 27. Sect. 9 is retrospective in all its expressions, and applies to the present case; *Culley* v. *Doe dem.*

(*a*) 10 *Bing.* 198., 6 *M. & G.* 314.; *S. C.* 9 *Cl. & Fin.* 606.
(*b*) 3 *Myln. & C.* 584. 612.
(*c*) 10 *Cl. & Fin.* 215.

Taylerson (*a*) is an authority for construing the limitation clauses retrospectively. [*Patteson* J. The difficulty I have felt, and do feel, is upon the words "the right" "to bring an action." The mere payment by a tenant of rent to the wrong person gives no right to assert the title; and how could the right accrue then?] It will accrue, if the tenant, on demand of rent by the rightful owner, refuses. [*Patteson* J. But that is not said.] Payment of rent to another will be a disclaimer: and, after notice of it, the time of limitation runs; *Hovenden* v. *Lord Annesley* (*b*), *Cholmondeley* v. *Clinton* (*c*) in Chancery, and *Cholmondeley* v. *Clinton* (*d*) in the House of Lords. [*Coleridge* J. Are not the words bound up with "after the determination of such lease?" *Patteson* J. The word "rent" is used in very different senses in this section.] The words at the end of the section are unambiguous. Next, this case does not fall within the protection of sect. 15. "Adverse" must mean adverse according to the rights declared in the statute itself. The words of that section are not "not be adverse," but "*shall not*" "*have been* adverse to the right or title of the person claiming to be entitled thereto." [*Patteson* J. Entitled to what? After the expiration of the lease there could be no receipt of rent; and during the lease the landlord would not be entitled to the possession. The possession of the tenant here was not adverse; he held under a good lease. Do you say the landlord is in receipt of the profits? Must you not construe sect. 15 with sect 9? In sect. 9 "receipt of the profits" does not mean re-

(*a*) 11 *A. & E.* 1008.
(*b*) 2 *Schoa. & Lef.* 607, 621, 624, 625.
(*c*) *Turn. & R.* 107. 118, 119. (*d*) 4 *Bligh*, 1. 99.

ceipt by the landlord, but by the tenant.] In sect. 35 it seems to mean receipt by the landlord. Sect. 9 is inapplicable where no rent is reserved; *Ex parte Jones* (*a*): the nonpayment of rent to the lessor is not adverse as against him, under sect. 2 or 9, unless it be paid to another; *Doe dem. Davy* v. *Oxenham* (*b*), *Chadwick* v. *Broadwood* (*c*). In all these cases the question has turned on the receipt of rent reserved. Now, if sect. 15 speaks of "receipt of the profits," or "receipt of the rent," with reference to the landlord, there clearly has here been an adverse receipt by the *Brownes*. [*Patteson* J. Sect. 8 is expressed in the same way as sect. 15: and there "in possession," and "receipt of profits," and "receipt of rent," apply to the tenant.] Sect. 9 speaks of the receipt of rent reserved: and that is the meaning attached to "receipt" of "rent" in sect. 3. If, in a writ of right, the receipt of rent would shew a taking of the esplees, then this, according to the old law, would be an adverse possession; and here the term "rent" should have the same meaning, and be synonymous with esplees.

Cur. adv. vult.

Lord Denman C. J. now delivered judgment.

The first question in this case is, what is the proper construction to be given to the words in the will of the testator made in 1776 (*d*), which are as follows. (His Lordship then read the words: see antè, p. 328—330.)

The defendant in this action, the son of Mr. *William Browne* (*e*), the devisee, is undoubtedly the heir general both of the testator and of *William Angell*, the first

(*a*) 4 *Young & C. Exch.* 466.
(*b*) 7 *M. & W.* 131.
(*c*) 3 *Beav.* 308.
(*d*) The latest date is 1775.
(*e*) See antè, p. 336, note (*d*).

purchaser at *Crowhurst:* but he traces his descent through a female, namely, from *Frances Angell*, afterwards *Browne*, the only child of *William Angell*, who was the eldest (*a*) son of *John Angell* (*The Caterer*), who was the eldest son of *Willliam Angell*, the first purchaser at *Crowhurst*. *John Angell* (*The Caterer*) had five (*b*) sons, besides *William*, the father of *Frances Brown:* three of those five died without issue. Another, *Justinian*, was the grandfather of the testator, with whom that male line expired. The lessor of the plaintiff endeavoured to trace his descent from the youngest, *Thomas*, entirely through males. The question therefore is, whether, in order to satisfy the words of the testator's will, the claimant must be heir general as well as male.

We do not think it necessary to examine minutely all the authorities on this much litigated question. The cases of *Wills* v. *Palmer* (*c*) and of *Goodtitle dem. Weston* v. *Burtenshaw* (*d*) are relied on to shew that the rule laid down by Lord *Coke*, in *Co. Litt.* 24. b., has been altogether destroyed. But it is not necessary, in this case, to go so far. It must be admitted, on all hands, that the rule is modified as stated by Lord *Hardwicke* in *Newcoman* v. *Bethlem Hospital* (*e*); so that, unless there be some circumstances to take a case out of the rule, a claimant must shew himself heir

(*a*) He was the eldest of those who survived their father. Those (four in number) who died before the father left no issue.

(*b*) He had, in all, ten sons, of whom six survived him, namely, the third, fourth, fifth, sixth, seventh and ninth. Of these six, the fourth, fifth and sixth appeared to have left no issue living at the date of the will. It will be seen that the principle of the judgment is not affected by these variances.

(*c*) *5 Burr.* 2615.

(*d*) *Fearne's Cont. R.* 570. Appendix, No. 1. (*e*) *Amb.* 8.

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general as well as male, but that there may be such plain indications of a contrary intention in the testator as to take a case out of the rule.

Here we are of opinion that there is such plain indication of a contrary intention. The testator, in this clause of his will, speaks of his great grandfather *John Angell* (that is *The Caterer*), and of the defendant's father (*a*) being the grandson to *Frances Browne*, who was an *Angell*. Mrs. *Frances Browne*, it appears, was the first cousin of the testator's father, the only child of the eldest (*b*) brother of the testator's grandfather. The testator plainly knew the pedigree of the family, for several generations, up to *William*, the first purchaser at *Crowhurst*. He speaks of his great aunts, *Maryott*, *Lucy*, and *Hocknall*, daughters of his great grandfather *John* (*The Caterer*): he knew that Mrs. *Frances Browne* was an *Angell*, and could hardly have been ignorant that her father was his great uncle, which was probably the reason of his preferring the *Brownes*, as being descended from a male *Angell*, son of *John The Caterer*, to the *Marryotts*, *Lucys* and *Hocknalls*, who were descended from females, daughters of the same *John Angell*. He must also have known that the defendant's father was the heir general of *William Angell* at *Crowhurst*. When, therefore, he used the words "male heirs, if any such there be, of *William Angell*, the first purchaser at *Crowhurst*," he must have been aware that, if the word "heirs" was taken in its strict sense, there could not possibly be any person answering the description. Neither could he have meant the heir general of *William* at *Crowhurst*, provided such heir

(*a*) See ante, p. 336, note (*d*). (*b*) See p. 351, note (*a*).

general was a male: for the defendant's father answered that description, and yet there is an express devise to him in default "of the male heirs or *descendants*" of *William* of *Crowhurst*, which expression, as well as the subsequent words "the males to take place first, so long as there be any, through every descent," strengthens the supposition that the testator, by his first devise, intended to point at those, if any, who could trace from *William* of *Crowhurst* entirely through males. The early authorities, as is remarked in the note (7) to 1 *Powell on Devises*, 328. (3d ed.), read such a devise as one to the heir general, provided that heir is a male; but the learned editor has expressed much doubt whether it would be so read at the present day, referring to the cases of *Baker* v. *Wall* (*a*), and to *Lord Ossulston's Case* (*b*) and *Doe dem. The Earl of Lindsey* v. *Colyear* (*c*), shewing that a devise to *A.* and his heirs male or female, or to *A.* for life and after his death to his right heirs male for ever, is an estate tail: and it may be well argued that, as the words "heirs male" have the meaning of heirs male of the body when used as words of limitation, so they should now have the same meaning when used as words of purchase.

It is observable that, in the present case, the words are used as words both of purchase and limitation: for the devise runs "to the male heirs, if any such there be, of *William Angell*, the first purchaser at *Crowhurst*," "and their male heirs for ever." In the first part, they are words of purchase; in the last part, of limitation: there is no doubt that in the last part they mean male heirs of the body of the devisee: why should they not

(*a*) 1 *Ld. Raym.* 185. (*b*) 3 *Salk.* 336.
(*c*) 11 *East*, 548.

then be taken to mean the male heirs of the body of *William Angell*, the first purchaser at *Crowhurst*, in the first part? But, whatever may be the right construction as a general rule, we are of opinion that in this case the words must be construed in a special sense by reason of the plain indication of the testator's intention collected from the will itself. Now that special sense can only be, male heirs of the body of *William Angell* at *Crowhurst;* and a person, to answer that description, must clearly trace entirely through males. The defendant does not so trace; but the lessor of the plaintiff, if the facts he asserts be established, does.

It was urged, in argument, that the devise must be held void for uncertainty: and the case of *Oddie* v. *Woodford* (*a*) was cited. That case arose upon the well known will of Mr. *Thellusson;* the words being "eldest male lineal descendant." The two points then argued were, whether the devise was void for uncertainty, and whether a person, in order to answer the description, must trace entirely through males. The same points arose when the will was first litigated before Lord *Loughborough*, assisted by Mr. Justice *Buller*, Mr. Justice *Lawrence* and Lord *Alvanley*. Those learned persons seem to have had no difficulty as to the question of uncertainty: but Lord *Eldon* evidently felt considerable difficulty. Yet he held that the devise was not uncertain, though earnestly wishing that the parties should appeal. They did appeal to the House of Lords; and *Alexander* C. B. delivered the unanimous opinion of the Judges. The question of uncertainty does not appear to have been put to the Judges, though it was raised by the appeal: and the decision of Lord *Eldon* was con-

(*a*) 3 *Myl. & C.* 584.

firmed. In that case, also, it was held that a person, in order to satisfy the words "eldest male lineal descendant," must trace entirely through males. We think that the words in the present case, "male heirs," are at all events full as certain as the words in Mr. *Thellusson*'s will, and that no valid objection can be maintained on that ground. The first question, therefore, must be determined in favour of the lessor of the plaintiff (*a*).

The second question arises under the 9th section of stat. 3 & 4 *W.* 4. *c.* 27.; upon the true construction of which we are of opinion that this action of ejectment would be barred by lapse of time, if not saved by the 15th section of the same act. Considerable difficulty arises in the construction of this act of parliament, by reason of the word "rent" being used in two different senses throughout, viz. in the sense of a rent charged upon land, and of a rent reserved under a lease. In the very first section of the act, the interpretation clause, it is used in both senses; for it is made to extend "to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land." In the second section, it is used in the sense of rent charge only, as was stated by *Tindal* C. J. in the judgment in *Paget* v. *Foley* (*b*), and as expressly held by the Court of Exchequer in the case of *Grant* v. *Ellis* (*c*). The word is used in the same sense in the 3d, 4th and 5th sections. In the 7th section it is used in the same sense: the words are, "when any person shall be in possession or in receipt of the profits of any land, or in *receipt* of any *rent*, as tenant at will." Now a tenant at

(*a*) See *Wrightson* v. *Macaulay*, 14 *M.* & *W.* 214.

(*b*) 2 *New Ca.* 679. 688. (*c*) 9 *M.* & *W.* 113.

will of *land* out of which a rent is *reserved* cannot by any possible construction of language be said to be in the *receipt* of that rent which he *pays:* he cannot be tenant at will of the land and of the rent also: indeed no one can be said to be tenant of, or to have any estate in, the rent reserved by a lease, as was shewn in the case of *Prescott* v. *Boucher* (*a*), and was agreed to in the judgment in *Grant* v. *Ellis* (*b*). The word "rent" therefore, in the 7th section, must mean rent charge: and there is no absolute absurdity in supposing that a person seised in fee or for life of a rent charge might, for a gross sum of money, demise it for years, or at will, at a smaller rent. In the 8th section the same sense must, for the same reasons, be given to the word "rent," in the earlier part of the section: but, at the close of it, the word is manifestly used in the other sense, viz. that of rent reserved, the words being "or at the last time when any *rent* payable in respect of such tenancy shall have been received."

We come now to the 9th section, on which this case turns. The word "rent" is there used seven times. The first time, it means rent charge; the second and third, rent reserved; the fourth, rent charge; the fifth, rent reserved; the sixth, rent charge; the seventh, rent reserved. If the word "rent charge" be substituted for "rent," where the meaning is such, in this section, the section will run thus, and the meaning will be clear: "And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any *rent charge*, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20*s.* or upwards shall be reserved, and the rent re-

(*a*) 3 *B.* & *Ad.* 849. 859. (*b*) 9 *M.* & *W.* 124.

served by such lease shall have been received by some person wrongfully claiming to be entitled to such land or *rent charge* in reversion immediately expectant on the determination of such lease, and *no payment in respect of* the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or *rent charge*, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at *the time at which the rent* reserved by such lease was first so received by the person wrongfully claiming as aforesaid; *and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.*"

Now, in this case, a lease for sixty one years was made by the testator to one *Weston*, in the year 1776. The testator died in 1784; and from his death till the year 1837, when the lease expired, the defendant's father and himself have received the rent reserved by the lease. It must be assumed, for the purpose of this argument, that the lessor of the plaintiff, or those through whom he claims, were entitled to receive this rent, and that the defendant received it wrongfully. No payment in respect of the rent has ever been made to the lessor of the plaintiff, or any person through whom he claims. The right, therefore, to bring an action of ejectment after the determination of the lease must be deemed to have accrued in 1784, the time at which the defendant's father first received the rent, and not upon the determination of the lease.

This 9th section is commented on, in the course of the judgment, in *Grant* v. *Ellis* (*a*); and the right of a

(*a*) 9 *M.* & *W.* 127.

lessor of the plaintiff, circumstanced as in this case, is considered to be clearly barred. It may seem strange that a right to bring an action of ejectment in the year 1837, when the lease in question determined, should be held to have first accrued in 1784, and to be barred by the lapse of twenty years in 1804, thirty three years before the time for bringing such action had arrived: but such is the express enactment: and it must be recollected that the lessor of the plaintiff, or those under whom he claims, might have prevented the consequences by claiming the rent within the twenty years; and, if it was not paid, by distraining or bringing an action for it, and so trying the right. It was urged that from this construction of the act it would follow that, if the lease had expired one day after the passing of the act, the lessor of the plaintiff would be barred; whereas, if it had expired two days before the passing of the act, he would have been entitled, and that so great a change could not have been intended. This argument was urged, both in regard to the general meaning of the section, and also in regard to a ground which was much pressed, viz. that the section is at all events prospective only; as was held in regard to the 7th section in *Doe dem. Evans* v. *Page* (*a*). It is very true that the change is great; for undoubtedly at common law a party entitled to land subject to a lease might bring an action of ejectment to recover the land within twenty years after the expiration of the lease, although another had wrongfully received the rent under that lease. The possession of the lessee being lawful, the person entitled to the rent might, if he pleased, abstain from enforcing his right, and treat the possession as not being adverse to him. But the doctrine as to non-ad-

(*a*) 5 Q. B. 767.

verse possession is put an end to by this very statute, as was held in *Nepean* v. *Doe dem. Knight* (*a*), in a Court of error: and, if the meaning of the section be plain, the greatness or suddenness in the change of the law cannot affect that meaning. We are of opinion that the words of this section are plain, and must have the construction we have already put upon them.

With respect to the section being retrospective, it is sufficient to say that the lease for sixty one years was in existence at the time when the act passed, which distinguishes this case from *Doe dem. Evans* v. *Page* (*b*). It is true that, by applying this 9th section to the facts of this case, we find that, by the retrospective operation, the lessor of the plaintiff had lost his right nineteen years before the act passed, when, if the act had not passed, he would still have his right for eleven years yet to come: but such appears to have been the intention of the legislature, in order to quiet possession when there has been a long omission in a party to assert his rights. We find that, since this case was argued, the Court of Exchequer, in the case of *Doe dem. Jukes* v. *Sumner* (*c*), has held that the 8th section of the act is retrospective, agreeing that *Doe dem. Evans* v. *Page* (*b*) was rightly decided; which is a strong authority for so construing the 9th section (*d*).

It remains only to consider whether the lessor of the plaintiff's right of action is saved by the 15th section of the act. Now that section is as follows: "when" "the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing

(*a*) 2 *M. & W.* 894. 911. (*b*) 5 *Q. B.* 767.

(*c*) 14 *M. & W.* 38.

(*d*) See *Owen* v. *De Beauvoir*, 16 *M. & W.* 547.

of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress or bring an action to recover such land or *interest* at any time within five years next after the passing of this act." The word "interest," which is in the Parliament Roll, appears to be a mistake for "rent."

This action was brought within the five years. It is plain that the possession and receipt of the profits of the *land* was not adverse to the lessor of the plaintiff when the act passed; for that possession and receipt was under a valid lease by which the lessor of the plaintiff was bound. Whether the receipt of the *rent* was adverse to him depends on the sense in which the word "rent" is there used. We are of opinion, with reference to the other sections, and for the reasons already given, that the word "rent" in this section does not mean rent reserved on a lease.

For these reasons, we think that the right of the lessor of the plaintiff is saved by the 15th section of the act.

We have already expressed our opinion, on the last argument, that the verdict was so far contrary to the evidence as that the case ought to be submitted to another jury. And therefore the rule for a new trial must be made absolute upon payment of costs.

Rule for a new trial absolute, on payment of costs (*a*).

(*a*) The case was again tried at the *Surrey* Spring assizes, 1846, before Lord *Denman* C. J., when a verdict was found for the defendant. In *Easter* term, 1846, *Shee* Serjt. moved for a new trial; but the Court refused the rule. In this last case, no point arose which it is thought necessary to report.

TRINITY VACATION (*a*).

SMITH *against* BALL.

Saturday, June 13th.

ASSUMPSIT. The first count stated that, "whereas certain persons, under the name, style or firm of *James Chandler and Son*, heretofore, and before the commencement" &c., to wit 16th *February* 1846, "made their bill of exchange in writing, and directed the same" to defendant, and thereby required defendant to pay "to the order of the said *James Chandler and Son*" 50*l.* for value received, six weeks after date (which period had elapsed), and defendant then accepted the said bill: "and the said *James Chandler and Son* then indorsed the same" to plaintiff; and defendant, in consideration of the premises respectively, then promised plaintiff to pay him the said bill, "according to the tenor and effect thereof, and of the said acceptance and indorsement:" breach, non-payment.

Declaration, by indorsee against acceptor, described the bill as made by "certain persons under the name, style or firm of *James Chandler and Son*," and as indorsed to plaintiff by "the said *James Chandler and Son*." Held good, on special demurrer.

Demurrer, assigning for cause that the count does not shew that the said persons, mentioned in the count as *James Chandler and Son*, and as persons who made the bill under that name, style or firm, indorsed the said bill by or under that description, style or firm; nor does it state the christian or surnames of the said persons; whereas it ought to have stated their christian and surnames, or the initial or contraction of their christian name or names used by them in addition to

(*a*) The Court sat in banc on *June* 13th, 15th, 20th, 24th, 25th, 26th and 27th.

their surnames, or else to have shewn that they indorsed the said bill to the plaintiff by the style and description of *James Chandler and Son;* and for that it is quite consistent with the allegations in the count that the said persons, called therein the said *James Chandler and Son,* may have indorsed the bill by their christian and surnames, in which case such christian and surnames ought to have been stated in the count: and also for that the description of the drawers of the bill in the count is insufficient and uncertain, and it ought to have been stated what were the christian and surnames of the said persons who made the bill, or that they traded under or habitually used the said style and firm of *James Chandler and Son;* and it is not sufficient to shew that the said persons on one occasion only made a bill.

Joinder in demurrer.

Jos. Brown, for the defendant. The christian names of the drawers ought to have been stated; that is the rule as to all parties mentioned in pleadings; *Appelmans* v. *Blanche* (*a*). This general rule is recognized by sect. 12 of stat. 3 & 4 *W.* 4. *c.* 42., where an exception is allowed, in particular cases, as to affidavits to hold to bail, and process or declaration, on bills and notes. In *Ball* v. *Gordon* (*b*) the declaration was as here, and was specially demurred to: and, the Court intimating an opinion in favour of the objection, the plaintiff had leave to amend. In *Tigar* v. *Gordon* (*c*) the drawing was described to be by "certain persons, by and under the name, style, and firm of *James Gale and Son,*" and the indorsing to be by "the said persons, by and

(*a*) 14 *M. & W.* 154. See *Esdaile* v. *Maclean,* 15 *M. & W.* 277.
(*b*) 9 *M. & W.* 345.
(*c*) 9 *M. & W.* 347.

under the said name, style, and firm of *James Gale and Son;*" and this was held sufficient. The two cases together shew the correct rule: either the proper names must be given in full, or the parties must be described as using a particular style; here the indorsement is said to be by "the said *James Chandler and Son*," not by persons using that style. It is true that, in the case last mentioned, *Parke* B. avoids acquiescing in *Ball* v. *Gordon* (*a*).

Dowdeswell, contra. *Ball* v. *Gordon* (*a*) is not an express decision; and the authority of the case is at least counterbalanced by *Tigar* v. *Gordon* (*b*). The persons named in a mercantile instrument, not being parties to the suit, are best described as they are named in the instrument: their proper names can often not be ascertained. In *Knill* v. *Stockdale* (*c*) the declaration stated that parties named made a bill of exchange, and thereby required defendant to pay to "the drawers'" order; and the Court set aside, as frivolous, a special demurrer on the ground that the name of the drawers should have been given in describing the requisition of the bill. The Court here cannot but see that the parties named as indorsers are those described as the drawers, and will act upon that view, as the Court of Exchequer did in *Spyer* v. *Thelwell* (*d*), where "his order," though the last antecedent was the drawee, was referred to the drawer. The general principle, in decisions on the pleadings on bills of exchange, has been to look to the substance of the transaction. The

(*a*) 9 *M. & W.* 345. (*b*) 9 *M. & W.* 347.
(*c*) 6 *M. & W.* 478.
(*d*) 2 *C. M. & R.* 692.; *S. C. Tyrwh. & G.* 191.

bill may have been indorsed for "*John Chandler and Son*" by an agent, consistently with this declaration; and he might have described himself as acting "for *James Chandler and Son;*" *Heys* v. *Heseltine* (*a*). A single person, using a style denoting a firm of several persons, may be described as "certain persons trading under the name," &c.; *Bass* v. *Clive* (*b*). But, if the technical rule be so strict as is contended for on the other side, then the plaintiff is entitled to insist that it does not appear but that *James Chandler and Son* is a proper name; *Walker* v. *Parkins* (*c*).

Jos. Brown, in reply. Undoubtedly the declaration is good in substance; but the question raised by the special demurrer is whether it be good in form. [Lord *Denman* C. J. Suppose an indorsement were produced, with the names *James Chandler* and *James Chandler Junior:* would that support the present allegation of indorsement?] It would. [Lord *Denman* C. J. Yet that would not identify the indorsers with the drawers, who are persons using the style of *James Chandler and Son.*] That seems to convert the objection into one of substance. The indorsers must be identified with the drawers; and the identity should appear on the bill itself; *Kirk* v. *Blurton* (*d*), *Carvick* v. *Vickery* (*e*).

Lord DENMAN C. J. I think this declaration is well enough. There must be judgment for the plaintiff.

(*a*) 2 *Campb.* 604.
(*b*) 4 *M. & S.* 13.; *S. C.* at *N. P.* 4 *Campb.* 78.
(*c*) 2 *Dowl. & L.* 982.
(*d*) 9 *M. & W.* 284.
(*e*) Note [134] to *Whitcomb* v. *Whiting*, 2 *Doug.* 653. 654.

PATTESON J. (*a*) I think *Tigar* v. *Gordon* (*b*) overrules *Ball* v. *Gordon* (*c*).

Judgment for plaintiff (*d*).

(*a*) Only two Judges were present.

(*b*) 9 *M. & W.* 347.

(*c*) 9 *M. & W.* 345.

(*d*) See *Levy* v. *Webb* and *Gatty* v. *Field*, post, pp. 427. 431.

PAULL, and ANN his Wife, Executrix of HARWOOD, *against* SIMPSON.

Friday, June 26th.

COVENANT, by executrix of reversioner (her husband joining), for non-payment of rent reserved by an indenture of lease. The declaration stated a demise to one *Weklin* for thirteen years; covenant by *Weklin* to pay rent; entry and possession by *Weklin*; and that, after the making of the indenture, and during the term, all the estate &c., then to come and unexpired, of *Weklin*, of and in the demised premises with the appurtenances, "by assignment thereof then made, legally came to and vested in the defendant." Breach, that, after the making of the indenture, "and after the defendant became such assignee as aforesaid, and while he continued to be such assignee," and during the term &c., rent for one year became due &c.

Plea: That the estate &c. of *Weklin* of and in the demised premises with the appurtenances, "by assignment thereof made, did not come to or vest in the defendant, in manner and form" &c.: conclusion to the country. Issue thereon.

A declaration charging that, on &c., a lease became vested in defendant, "by assignment thereof then made," is supported, without proof of an assignment in fact, by evidence that the lease vested in defendant as executor de son tort.

A party who knowingly receives a chattel from an executor de son tort, and deals with it as his own, does not himself become thereby executor de son tort. So held, where the widow of an intestate possessed herself of a lease, part of his estate, without taking out administration, and handed it to another party, who kept it, and occupied the premises for the residue of the term with the landlord's assent.

On the trial, before *Wightman* J., at the sittings in *Middlesex* during *Trinity* term, 1845, it appeared that, while the lease was still subsisting, *Weklin* died intestate, and his widow kept possession of the premises, and paid rent, but no administration was taken out. A few months afterwards the defendant took possession of the premises, and stated to the agent employed to collect the rents that he was from thenceforth to be the tenant under the lease, which he at the same time produced. He continued in possession till the end of the term, and paid the reserved rent for two years, but omitted to pay it for the last half year, which was the default now complained of. It appeared that there had been some arrangement between the defendant and Mrs. *Weklin*: but the precise nature of it was not shewn; nor was there any express proof of a written assignment. No witness was called for the defendant. *Wightman* J., in summing up, told the jury that they might, if they saw ground for it, infer an assignment from the evidence; and, at the instance of the defendant's counsel, who contended that the assignment, if any, must have been written (*a*), he left it to the jury to say whether the evidence raised a presumption in their minds that *Weklin*'s remaining interest in the term had been assigned to the defendant in writing. The learned Judge stated that, on the case as it stood, he himself should be disposed to say that the defendant was assignee; if not, he did not know under what circumstances the possession had been taken. The jury found a verdict for the defendant.

(*a*) Stat. 29 *Car.* 2. *c.* 3. *s.* 3.

Sir *John Bayley*, in the same term, moved for a new trial on the grounds of misdirection and that the verdict was against the evidence. On the first point, he contended (as had also been done at the trial) that the defendant might have been assignee by operation of law (*a*); that he was so if he took the lease from an executrix de son tort, for then he himself stood in the situation of an executor de son tort; and that the possibility of such an assignment was not submitted to the jury. He cited 2 *Wms. Executors*, 1491 (*b*), *Lyddall* v. *Dunlapp* (*c*), *Garth* v. *Taylor* (*d*), and 3 *Bac. Abr.* 448 (7th ed.) tit. *Executors and Administrators* (B), 3. A rule nisi was granted.

Lush now shewed cause. First, the words of the declaration "by assignment thereof then made" point to an assignment in fact, and not by operation of law; and the circumstances here proved were no evidence of an assignment in fact; *Botting* v. *Martin* (*e*), *Hyde* v. *Moakes* (*g*). [*Patteson* J. There is a case in 4 *Term Reports* (*h*) where an averment that the reversion, on a lease, came to the defendant by assignment was held sufficient, though it appeared that the estate had descended to him as heir at law.] The words "then made," in this case, tie the allegation down more closely. [*Wightman* J. It is usual to state an assignment in law to a defendant in the words "by assignment then and there made:" and the books of pleading say that the words include

(*a*) Stat. 29 *Car.* 2. *c.* 3. *s.* 3.

(*b*) 4th ed. Part 4. B. 2. c. 1. § 2. The 3d edition was cited. See *ib.* vol. i. p. 211 (4th ed.). Part 1. B. 3. c. 5.

(*c*) 1 *Wils.* 4.

(*d*) *Freem. C. B.* 261.

(*e*) 1 *Camp.* 317, 318.

(*g*) 5 *Car. & P.* 42.

(*h*) *Derisley* v. *Custance*, 4 *T. R.* 75.

that, as well as an assignment in fact. The words "then made" add nothing. Lord *Denman* C. J. If a party becomes assignee when he becomes heir, it may be said that the assignment is "then made." *Wightman* J. At any rate the words may be rejected.] The plaintiff is bound by the mode in which he chooses to state an assignment. [*Wightman* J. That might be so if he stated a particular mode of assignment.] Secondly, the defendant was not assignee by operation of law. It is true that the lease was offered to him by Mrs. *Weklin*, and he took it off her hands; but there is no authority to shew that a person taking a chattel from an executor de son tort becomes such an executor. On the contrary, it is laid down, in 1 *Wms. Executors*, 216 (*a*), that, "If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me;" and the author cites *Godolph. Orphan's Legacy*, p. 91, Part 2. c. 8. s. 1 (3d ed.), which is to the same effect, and *Com. Dig. Administrator* (C 2.). The defendant here, in taking the lease, did not claim to do so as executor. He entered under the consent of the landlord himself. In *Hyde* v. *Moakes* (*b*) it was held that use and occupation would not lie, because there had been no express substitution of the defendant for the original lessee as tenant. Here the facts amounted to substitution with the landlord's consent.

Sir *John Bayley*, contrà. On the evidence here, the allegation, that *Weklin*'s estate came to the defendant by assignment, is sufficient according to the practice of pleaders. [Lord *Denman* C. J. You need not argue

(*a*) 4th ed. Part 1. B. 3. c. 5.

(*b*) 5 *Car. & P.* 42.

that.] Then, the learned Judge's direction to the jury to consider whether there was an assignment in writing or not was too narrow. The defendant was in as executor de son tort, and therefore by assignment in law. The widow might have been charged as executrix de son tort; the defendant is chargeable in like manner. There may be one executor de son tort after another; the defendant, having dealt with the property, cannot deny that he is such executor. [*Wightman* J. You must maintain that, if another had taken from him, that person would have become executor de son tort, and so in continual succession.] As to the passage cited from 1 *Wms. Executors*, 216, there may be a distinction between goods which, on being given, pass at once, possession carrying the absolute property, and a lease. The defendant, here, taking the residue of the term from Mrs. *Weklin*, might become executor de son tort in respect of the portion of time during which he held.

Lord DENMAN C. J. I should myself have thought it likely that there was a written assignment in this case, though it is often omitted on such occasions: but very probably the finding of the jury was right; and I cannot pronounce that the verdict was against the evidence. As to the question of assignment by operation of law: the defendant here received the lease from the widow, who was executrix de son tort, and did not himself interfere in the first instance. There might be a case of collusion (*a*), which would make the party so taking a primary dealer with the property; but here that is not shewn: the widow takes possession of the lease, and gives it to the defendant; and the transaction has direct authority

(*a*) The same suggestion is made in 1 *Wms. Executors*, p. 216, note (*e*).

from the landlord. The effect of the proceeding is, that the defendant and not the widow is to be charged with the rent in future. Sir *John Bayley* endeavoured to draw a distinction between a lease and an ordinary chattel; but there is no ground for it. A lease vests at once, like another chattel.

PATTESON J. The authority of *Godolphin* is precise on the point that, if one takes goods of the deceased, and hands them to another, this shall charge only the giver as executor de son tort. And, in the present case, if there was no evidence that the defendant was executor de son tort, there was no evidence that the assignment came by operation of law.

WIGHTMAN J. It was clear that the widow was executrix de son tort: the question was whether the defendant took by assignment from her. It could not be an assignment in fact, unless by writing: and I thought there was some evidence of that: but the jury were of a contrary opinion. It might have been an assignment by operation of law; but the mere fact that the defendant had dealt with goods administered by the widow was not sufficient to charge him as assignee in law. The passages from *Godolphin* and *Com. Dig. Administrator* (C 2.) are express authorities on this point. If this were not so, there would be no end to the number of persons who might be charged, especially in the case of a long lease, which might pass through a number of hands in succession. Besides, a person who is executor de son tort is executor generally; so that the doctrine contended for by the plaintiffs would produce the greatest confusion.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

KEIR *against* LEEMAN and PEARSON.

In an action of assumpsit, it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a fi. fa. issued by plaintiff against the goods of one of the persons indicted. Defendants (being third parties), in consideration that plaintiff would, at their request, not further prosecute, promised to pay the balance in the original action in consideration

ASSUMPSIT. The first count of the declaration stated that, before the making the promise &c., plaintiff recovered in the Queen's Bench a judgment against *George Emmitt*, and sued out a fi. fa., which was indorsed &c., and delivered &c.: that the sheriff made his warrant thereon, which was delivered to one *George Acton*, to be executed &c.; who thereupon, by virtue &c., entered on a farm, and a messuage and dwelling house, of *G. Emmitt*, and seized goods and chattels of *G. Emmitt*, as and for goods and chattels of *G. Emmitt*, in the said messuage &c., and divers crops and effects, to wit of *G. Emmitt*, as and for the crops of *G. Emmitt*, on the farm: and, *Acton* being in possession, one *William Emmitt*, claiming the farm, messuage, dwelling house, goods and chattels, crops and effects, as his own property, had, with other persons, to wit the said *G. Emmitt*, *W. Ward*, *J. Atkinson*, *D. Hodgson*, *G. Atkinson*, and *J. Cromack*, assaulted *Acton*, and others his followers and assistants, and forcibly and violently ejected and expelled them from the messuage and dwelling house, remaining unsatisfied; and likewise the costs of the prosecution. Plaintiff, thereof, with the assent of the Judge before whom the prosecution was, at the assizes, forebore to prosecute further.

On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:

Held, by the Court of Exchequer Chamber, affirming the judgment of Q. B.,

That the consideration was unlawful, and that no action could be maintained on any of the promises.

and from the possession of divers of the goods and chattels, and kept the same in the dwelling house, and, by shutting the outer door, excluded *Acton* from the dwelling house and from the possession &c., till *Acton*, in order to retake possession, had necessarily and unavoidably a little broken the outer door, and thereby had re-entered and taken the goods &c.: That *W. Emmitt* commenced an action of trespass in the Queen's Bench against the sheriff and *Acton*, for the entry and seizing. The declaration then set out the pleadings and issues joined in the action, involving, among other things, the title to the messuage, dwelling house, goods and chattels: That the issues came on to be tried at the *Yorkshire* Summer Assizes, 1842, when *W. Emmitt* set up an assignment by *G. Emmitt* to trustees, and by the trustees to him, *W. Emmitt*, which assignment the sheriff and *Acton* insisted upon was fraudulent and void: That a verdict was found for *W. Emmitt* on an issue of Not Guilty, and for the sheriff and *Acton* on all the other issues: That the plaintiff had indicted *W. Emmitt*, *G. Emmitt*, *Ward*, *J. Atkinson*, *Hodgson*, *G. Atkinson* and *Cromack*, "for riotously assembling to disturb the peace, and for assaulting the said *G. Acton*, and others his followers and assistants, to wit on the occasion of his, the said *G. Acton*'s, entering the said messuage and dwelling house, and seizing the said goods and chattels," in execution of the writ and warrant: That the indictment had been found at the *Yorkshire* Lent Assizes, 1842, and stood for trial at the *Yorkshire* Summer Assizes, 1842: and plaintiff, after the verdict in the cause between *W. Emmitt* and the sheriff and *Acton*, and before and at the time of the making the promise by the now defendants, after next stated, was "about

to proceed further on such indictment," "and to try the same, and to adduce and offer evidence in support thereof:" That, before and at the time of making the promise &c., the sheriff, and *Acton*, his bailiff, were and had been, and continued, in possession of the crops &c. seized by virtue of the execution &c.; and, subject to the execution and possession thereby, *W. Emmitt* was and had been and continued in possession of the same; and divers costs and charges had been incurred in the seizing and remaining in possession &c., and a large balance of the costs and charges, and of the principal money, damages and costs recovered against *G. Emmitt*, remained unsatisfied: That the action by *W. Emmitt* against the sheriff and *Acton* had been defended in the name of the sheriff and *Acton*, but under the indemnity and on the retainer and at the costs and expenses of the now plaintiff, and divers costs and charges were due to the attorney about the defence of the suit: That the prosecution and indictment had been preferred and conducted on the retainer, and at the costs and expences, of the now plaintiff, and divers costs and expences were due to the attorney; of all which several premises defendants had notice: And thereupon afterwards, to wit 1st *September* 1842, "in consideration that the prosecutor, to wit the said prosecutor the now plaintiff, of the indictment, to wit the said indictment against the said *G. Emmitt* and others, to wit &c." (naming them), "would, to wit at the request of the defendants, not proceed further in such indictment, and of the sheriff of *Yorkshire*" (to wit the said &c.) "withdrawing, to wit by and with the consent and direction of the now plaintiff, at the request of the now defendants, from the possession, to wit the said possession of the crops and effects,

to wit" &c., "that is to say the said crops and effects so claimed by the said *W. Emmitt* to be the crops and effects of, and to be so assigned to, the said *W. Emmitt* as aforesaid, and so in his possession, subject to the said execution as aforesaid, at the farm, to wit" &c., "under the execution, to wit the said execution" &c., "the now defendants undertook and promised the now plaintiff to pay him, on or before the last day of *Michaelmas* term next thereafter, the balance, to wit the said balance of the principal money and costs then remaining unsatisfied, to wit the said principal money, damages and costs so recovered by the now plaintiff against the said *G. Emmitt* as aforesaid, and which then so remained unsatisfied as aforesaid in the original cause, to wit *Keir* against *Emmitt*," &c. (identifying the parties), "and the balance of costs and charges incurred in and about the execution, to wit the said balance of the said costs and charges incurred in and about the said execution of the warrant of fieri facias, to wit" &c. (identifying): Averment "that, confiding in the said promise of the defendants, the prosecutor of the said indictment, to wit the now plaintiff, against *G. Emmitt* and others, to wit" &c., "for riot and assault, to wit the said riot and assault, did not proceed further on such indictment; and that afterwards, to wit on" &c., "at the said Summer Assizes and sessions of oyer" &c., "then holden for the county of *York*, at" &c., "before *Thomas* Lord *Denman*," &c., "and Sir *William Henry Maule*," &c., "the said prosecutor of the said indictment, to wit the now plaintiff, did, by and with the assent of the said *George Acton*, and his said followers and assistants, so being the person so assaulted as aforesaid, instruct counsel to inform, and by such counsel did inform, the said Justices so as-

signed as aforesaid, in open Court, at the said assizes and sessions, of and concerning the premises, and did then and there, by and with the assent and leave of the said Court, thereupon forbear to proceed further, and to offer any evidence, upon the said indictment; and thereupon the said persons so indicted, to wit the said *G. Emmitt*," &c., " were, in due form of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon them:" of which the said defendants afterwards had notice: Averment, that plaintiff, confiding in the said promise &c., did forthwith afterwards, to wit on &c., withdraw the said execution, to wit &c., and give notice and directions to the sheriff of *Yorkshire*, and to the said *Acton*, his bailiff, to withdraw, and the sheriff and his said bailiff immediately did then withdraw, from the possession of the said crops and effects; of which defendants afterwards had notice. Averment, that the balance of the principal money, damages and costs, at the time of the promise by the defendants remaining unsatisfied, amounted to a large &c., to wit 84*l.* 12*s.*; and the balance of the costs and charges incurred in the execution, at the time of the promise remaining unsatisfied, to a large &c., to wit 63*l.* 11*s.* 11*d.*; of which defendants afterwards had notice: and, although the last day of the said *Michaelmas* Term hath elapsed, and *G. Emmitt* did not, before the said last day &c. or since, pay either of the balances, whereof defendants afterwards had notice, and were requested to pay, yet defendants have disregarded their said promise, and have not paid either sum.

Plea. That the indictment in the first count mentioned was to the tenor &c. The plea then set out the indictment, of which the first count charged that the

parties indicted, "with force and arms," "unlawfully, riotously and routously did assemble and gather together, to disturb the peace" of the Queen; "and, being so then and there assembled" &c., "in and upon one *Robert Ellison*, in the peace" &c. "being, unlawfully, riotously and routously did make an assault, and the said *R. Ellison*, then and there, unlawfully, riotously and routously did beat wound and ill treat, so that his life was greatly despaired of; and other wrongs to the said *R. Ellison*, then and there, unlawfully, riotously and routously did, to the great disturbance and terror of the liege" &c.; in contempt &c., to the evil example &c., and against the peace &c. The second count charged a riotous &c. assemblage with force and arms, to wit with sticks, staves and other offensive weapons, to disturb the peace &c., and that the parties indicted, being so assembled &c., armed as last aforesaid, did unlawfully, riotously and routously made a great noise, riot and disturbance, and remained and continued armed, &c., making such noise &c., for the space of one hour &c., and, being so assembled and gathered, in and upon one *George Acton*, being an officer of the high sheriff of *Yorkshire*, then and there being in the due execution of his duty as such officer, did make an assault, and him, so being in the execution &c., did beat, wound and ill treat, with intent to obstruct, resist and molest him in the execution of his duty as such officer, against the form of the statute &c. The third count charged an assault upon, and beating, wounding and illtreating of *Acton*, then and there acting in aid of a peace officer, to wit in aid of one *Robert Chalk*, then and there being a constable, and then and there being in the due execution of his duty as such

constable, with intent to resist and prevent the lawful apprehension of the parties charged for a certain offence for which they were liable to be apprehended by *Chalk* and *Acton*, that is to say, for having unlawfully, riotously and tumultuously assembled and gathered together to disturb the peace, and assaulted and beaten *Ellison* and *Acton;* against the form of the statute &c. The fourth count charged a riotous assembly, and an assaulting, beating and wounding of *Chalk*. The fifth count charged that the parties assembled with sticks &c., as in the second count, but without stating any assault. The sixth count charged an assault upon, and beating, wounding and illtreating of, *Chalk*, being a peace officer, to wit a constable, being in the due execution of his duty, against the form of the statute &c. The seventh count charged an assault upon, and beating, wounding and illtreating of, *Chalk*, not stating his office or duty, with intent to resist the lawful apprehension &c. (as in the third count), against the form of the statute &c. The eighth count charged a riotous assembling and assault upon *George Key*. The ninth count resembled the fifth. The tenth count charged an assault upon, and beating and wounding of, *G. Key*, acting in aid of a peace officer, to wit *R. Chalk*, being a constable in the due execution &c., contrary to the form of the statute &c. The eleventh count charged an assault upon, and beating, wounding and illtreating of *G. Key*, with intent as in the third count, but not mentioning *Ellison;* against the form of the statute &c. The twelfth count charged an assault upon, beating, wounding and illtreating of, *G. Key*, not assigning any special character to him. The thirteenth count charged the same as to *R. Chalk*. The fourteenth count charged the same as

to *G. Acton.* The fifteenth count charged the same as to *R. Ellison.* The plea then continued: "And so the defendants say that the said consideration for the said supposed promise in the said first count mentioned was and is illegal, and such supposed promise was and is wholly null and void: and this" &c. Verification.

General demurrer. Joinder.

The second count of the declaration resembled the first, except that the promise was laid to be, to pay to the now plaintiff's attorney the costs, as between attorney and client, of the defendants in the suit of *W. Emmitt* against the sheriff and *Acton.*

Plea to the second count, corresponding with that to the first count, mutatis mutandis.

General demurrer. Joinder.

The third count of the declaration laid the promise to be to pay to the now plaintiff's attorney the costs, as between attorney and client, of the prosecution; and in other respects corresponded with the first two counts.

Plea as before, mutatis mutandis.

General demurrer. Joinder.

In *Trinity* vacation, 1844, the Court of Queen's Bench gave judgment for the defendants (*a*); upon which judgment the plaintiff brought error in the Exchequer Chamber. Joinder in error.

The case was argued in last *Easter* vacation (*b*).

(*a*) *Keir* v. *Leeman*, 6 *Q. B.* 308. It has been found that the course of argument in the Court of Error has rendered necessary a rather fuller abstract of the record.

(*b*) *Monday, May* 11th, 1846. Before *Tindal* C. J., *Coltman*, *Maule* and *Cresswell* Js., and *Parke*, *Alderson*, *Rolfe* and *Platt* Bs. *Coltman* J. and *Alderson* B. left the Court towards the close of the argument for the defendants.

Bliss, for the plaintiff in error (the plaintiff below). The third count contains only a promise to pay the costs of the prosecution against *G. Emmitt* and the rest, as between attorney and client. As this narrows the promise, it will be most convenient to apply the argument to the third count. The consideration for the promise there laid is that the plaintiff, being prosecutor, would not proceed further on the indictment: and the question is whether that be an illegal consideration for such a promise.

It is necessary to keep in view the distinction between felonies and misdemeanours, and, again, the distinction between different kinds of misdemeanour. It may be admitted, for instance, that the abandoning a prosecution for perjury would not be a good consideration for a promise to pay money; that is the doctrine of *Collins* v. *Blantern* (*a*), which it is not necessary to impeach. But the principle will not apply to a prosecution, by a party assaulted, for the assault, unless it be true that all agreements to abstain from the prosecution of misdemeanour of any kind are illegal; and for this no authority can be adduced, except some dicta at nisi prius. The Court below appears to have acted upon a distinction between an indictment for an assault upon the prosecutor and an indictment for an assault accompanied by riot, made upon peace officers and their assistants. This distinction is not tenable. The indictment furnishes no criterion of the magnitude of the offence: an assault may be as grievous a crime as a riot. Such a distinction probably would never have been suggested before the statutes which gave a peculiar cha-

(*a*) 2 *Wils.* 341. 347. See notes to *S. C.*, 1 *Smith's Lea. Ca.* 154. 168. Also *Ward* v. *Lloyd*, 6 *M. & G.* 785.

racter to certain assaults by making them felonious. For instance, it could hardly have been contended that, before stat. 22 & 23 *C.* 2. *c.* 1. *s.* 7., money might not be taken to compromise an indictment for slitting the prosecutor's nose. Whatever distinction exists can therefore be founded only on the particular facts of the offence. Compounding a felony would be a distinct species of offence: it is so at common law, as theft-bote. [*Tindal* C. J. In felony there is a forfeiture; that would take away the means of paying compensation.] For felonious acts no action can be brought, unless an action for stolen goods, where the felon has been convicted, be an exception; but many misdemeanours, of which assault is one, may be the subject of either a criminal or a civil proceeding. For these it is reasonable that a compromise should be allowed: and, in fact, it often takes place with the sanction, and, indeed, at the suggestion, both of magistrates and of judges: only nominal damages could be expected in an action after the defendant had been punished upon indictment; and it is not improbable that, if damages were first recovered, the attorney general would enter a nolle prosequi on the indictment; at any rate, the punishment would be trivial. Before stat. 18 *Eliz.* *c.* 5. an informer upon even a penal statute could compromise the information or suit: he may still do so in the case of proceedings before magistrates; *Rex* v. *Crisp* (*a*). This statute was not declaratory, but introduced a new principle, as appears from *Williams* v. *Hedley* (*b*). [*Alderson* B. Can you suggest the limit between misdemeanours which may, and those which may

(*a*) 1 *B.* & *Ald.* 282.

(*b*) 8 *East*, 378.

not, be the subject of a compromise? What would you say to an indictment for a nuisance affecting a whole parish? Could that be referred to arbitration?] It could: and the practice is not uncommon (*a*). The lawfulness of compromising indictments for misdemeanours was recognised in *Johnson* v. *Ogilby* (*b*), A. D. 1734, a case of prosecution for fraud; in *Drage* v. *Ibberson* (*c*), 1798, also a case of prosecution for fraud, where Lord *Kenyon* adhered to the distinction, suggested in *Johnson* v. *Ogilby* (*b*), between felony and misdemeanour, though *Collins* v. *Blantern* (*d*) was cited. In *Rex* v. *Lord Falkland* (*e*), 1795, all matters in difference between the prosecutor of some indictments for perjury and the defendants were referred, with the acquiescence of Lord *Kenyon*. Some doubts have been expressed as to this proceeding, on the ground of its supposed inconsistency with the language of Lord *Kenyon* himself in *Rex* v. *Coombs* (*g*) and *Rex* v. *Rant* (*g*): but the only doubt was, whether it was not necessary to obtain the leave of the Court before a compromise was made between the parties. That admits the principle: and here the leave of the Court appears on the record. Mr. *Watson*'s view (*On Arbitration*, p. 59) of the result of all the cases is, "that indictments for assaults, nuisances, &c., may be referred to arbitration, by leave, or by authority of the Court where they are depending; but without such permission, or authority, indictments cannot

(*a*) See *Dobson* v. *Groves* and *Regina* v. *Dobson*, 6 *Q. B.* 637.

(*b*) 3 *P. W.* 277. 279. (*c*) 2 *Esp. N. P. C.* 643.

(*d*) 2 *Wils.* 341. 347.

(*e*) *Kyd on Awards*, 66 (2nd ed.). See *Watson on Arbitration*, p. 60. note (1) (3d ed.).

(*g*) *Kyd on Awards*, 64. See *Watson on Arbitration*, 59, 60.

be referred." In *Collins* v. *Blantern* (*a*) the indictment was for perjury: and it was expressly pleaded that the agreement was unlawful. The agreement was, not to give evidence. [*Alderson* B. I do not see how a party could have performed that agreement, if he had been subpœnaed.] Here the agreement is only not to proceed further: it does not appear that the plaintiff is a witness, or bound over; he may be merely a voluntary prosecutor. In *Fallowes* v. *Taylor* (*b*), 1798, a party, who had been directed by the magistrates in Quarter Sessions to prosecute for a public nuisance, and had prepared (but not preferred) bills accordingly, took a bond to himself for 500*l.*, conditioned for the removal of the nuisance: and the Court held the consideration legal. That case is the stronger, because the plaintiff had not, as here, a personal ground of action for the thing done. *Edgcombe* v. *Rodd* (*c*), 1804, is relied upon for the defendants. There an action was brought against magistrates for assault and false imprisonment: they pleaded that *C. M.* had obtained a warrant from them against the plaintiff for a statutable misdemeanour, on which the plaintiff had been committed till the Quarter Sessions: and that afterwards, before the said sessions, it was agreed by *C. M.* and the plaintiff, with the consent of the defendants, that *C. M.* should not further prosecute, and should consent to the plaintiff's discharge at the sessions in full satisfaction and discharge of the assault and imprisonment: that this was done, and the plaintiff accepted the non-prosecution and the discharge at sessions in full

(*a*) 2 *Wils.* 341. 347.
(*b*) 7 *T. R.* 475. See the judgment of *Lawrence* J.
(*c*) 5 *East*, 294.

satisfaction and discharge of the assault and imprisonment. In another (the third) plea the previous agreement and consent of the defendants were omitted. Both pleas were held bad on demurrer. There was clearly no satisfaction, because the forbearance of *C. M.* was only the act of a third party. The remarks which appear to be in favour of the present defendants were extrajudicial. It was said that the agreement was either illegal or no satisfaction: now, as it clearly was no satisfaction, the illegality is not shewn by the decision. Lord *Ellenborough* insists also upon the right of the Crown to the statutable penalty in that case: this ground (if not removed by *Rex* v. *Crisp* (*a*)) is inapplicable here. Lord *Ellenborough*'s language may be dwelt upon: but, if it be understood in the sense requisite for the defendants, his reasoning goes too great a length; for it would apply to all proceedings which are criminal in form. He did, however, seem to go as far in *Poole* v. *Bousfield* (*b*), 1807, where, at Nisi Prius, he held that an agreement to discharge from a debt, in consideration of the debtor not moving in Court to make the creditor answer the matters of an affidavit, was illegal and void. Probably the reliance will principally be on the language used in *Edgcombe* v. *Rodd* (*c*) by *Le Blanc* J., who said that the prosecution was for a public misdemeanour; that, if the plaintiff had acted illegally, the defendants ought not to have consented to the bargain; if legally, his discharge could be no consideration, and the consent of the defendants was unnecessary. It is clear that this asserts too much. All indictable offences are public: and, if it be sought

(*a* 1 *B. & Ald.* 282. (*b*) 1 *Campb.* 55.
(*c*) 5 *East*, 303.

to distinguish between those cases where an action will lie and those where it will not, the principle fails: it may well be that the public is more interested in some cases where an action will lie than in some where it will not. A riot or an unlawful assembly may produce injury to the prosecutor. In *Beeley* v. *Wingfield* (*a*), 1809, a party convicted at Quarter Sessions of a misdemeanour in ill treating his parish apprentice, gave the prosecutor, a parish officer, a promissory note to cover part of the expenses of prosecution; in consideration of which the Court of Quarter Sessions passed a sentence lighter than would have been passed otherwise. This Court held the consideration for the note to be not illegal. No stress can be laid on the circumstance that the party there had been convicted: it appeared, as a fact, that the payment did interfere with the course of justice: the objection was quite as strong as on the third count in the present case, where the agreement is stated to be for the costs of the prosecution. If such an arrangement is to be permitted at all, it is better that it should be made at an early stage. In *Baker* v. *Townsend* (*b*), 1817, a party was convicted at Quarter Sessions of an assault; and the Court respited the judgment, and allowed that, and another alleged assault, and all matters in difference, to be referred: the arbitrator awarded a sum in satisfaction of the assaults, and another in satisfaction of all costs incident to the proceedings: and, debt being brought on the award, the count was held good on demurrer. In a recent case, *Elworthy* v. *Bird* (*c*), an agreement for a separation of husband from wife, though comprehend-

(*a*) 11 *East*, 46.
(*b*) 7 *Taun.* 422.
(*c*) 2 *Sim. & Stu.* 372.

ing a compromise of indictments for assault, was enforced in equity. In *Kirk* v. *Strickwood* (*a*) an action was brought on a promissory note given by a party convicted of disobeying an order of maintenance, to cover the amount of maintenance due and costs, sentence having been deferred with a view to the arrangement: and the party, after giving the note, was fined a shilling and discharged. This Court, on the authority of *Beeley* v. *Winfigeld* (*b*), held the action maintainable.

In *Comyn* on *Contracts*, p. 24. (2nd ed.) ch. 2., the rule (8), adopted from *Pothier's Traité des Obligations*, Part. I. chap. I. sect. 1. art. 7. *s.* 98. (*c*), is thus given: "However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of." If, therefore, there be any state of facts, consistent with the record, under which the agreement declared upon could be legal, it is not to be gratuitously assumed that the contractors had any thing illegal in view; and then the declaration is not answered. To the same effect are *Jones* v. *Waite* (*d*), *Haines* v. *Busk* (*e*), *Sewell* v. *The Royal Exchange Assurance Company* (*g*), and *Harrington* v. *Kloprogge* (*h*); and the principle was taken for granted in *Holland* v. *Hall* (*i*). The agreement is, not to proceed further. Now, if the Attorney General

(*a*) 4 *B. & Ad.* 421. (*b*) 11 *East*, 46.

(*c*) *Tome* 1. p. 45. (ed. 1781.).

(*d*) 5 *New Ca.* 341., in *Exch. Ch.*; affirming the judgment of *C. P.* in *Waite* v. *Jones*, 1 *New Ca.* 656. Judgment of *Exch. Ch.* affirmed in *Dom. Proc.*, *Jones* v. *Waite*, 9 *Cl. & Fin.* 101.

(*e*) 5 *Taun.* 521. (*g*) 4 *Taun.* 856.

(*h*) Note (*a*) to *Palmer* v. *Bate*, 2 *Br. & B.* 678.

(*i*) 1 *B. & Ald.* 53.

had entered a nolle prosequi, the plaintiff would have necessarily abstained from proceeding: that is the only mode, strictly speaking, of discontinuing an indictment; *Elworthy* v. *Bird* (*a*): and, from *Rex* v. *Fielding* (*b*), it is probable that the Attorney General would have so acted, the plaintiff having received compensation. A similar principle was acted on by Lord *Hardwicke* in *The Mayor, &c. of York* v. *Pilkington* (*c*). Besides, it is not averred here that any public crime had been committed: there is no averment of a riot, or of an assault upon a public officer, in fact. The last four counts of the indictment itself contain no charge of assaulting any public officer, but only *G. Key* and other individuals; this is therefore quite within the principle of *Harrington* v. *Kloprogge* (*d*), where the agreement was held good for so much as could lawfully be agreed for. Suppose the defendants were innocent: might not the plaintiff abstain from proceeding? [*Maule* J. Would that be a good bargain in the case of an indictment for felony?] Cases of felony are distinguished from those of misdemeanour: it will be admitted that in some cases indictments for misdemeanour may be compromised for money.

Martin, contrà. It appears by the record that the promise here was made in consideration of the plaintiff abandoning a prosecution for assault on persons acting in aid of a peace officer in the execution of his duty; an offence which, by stat. 9 *G.* 4. *c.* 31. *s.* 25., subjects the offender to two years' imprisonment with

(*a*) 2 *Bing.* 258.
(*b*) 2 *Bur.* 719.
(*c*) 2 *Atk.* 302.
(*d*) 2 *Br. & B.* 678.

hard labour. That is, at any rate, a part of the agreement which is illegal: and, if illegal, it vitiates the whole; as appears by the authorities cited in Mr. *Smith*'s note to *Collins* v. *Blantern* (*a*), the judgment of *Tindal* C. J. in *Shackell* v. *Rosier* (*b*), and *Com. Dig. Action upon the Case upon Assumpsit* (B 13.), (F 4.), (F 7.). The consent of the Court could give no legality to such a contract. It is suggested that a nolle prosequi would be a legal mode of putting an end to the indictment: but, if the prosecutor were to engage, for a payment of money, to obtain the nolle prosequi, that could constitute no legal contract. The argument proves too much: the Attorney General might enter a nolle prosequi on an indictment for felony. The cases mentioned in the latter part of the argument on the other side are inapplicable to the present question. *Holland* v. *Hall* (*c*), cited for the plaintiff, is a strong authority against him: there the contract was primâ facie illegal, though, if certain other facts had existed, which were not shewn either to exist or not to exist, the contract would have been lawful: but the Court held it to be illegal; and *Abbott* J. said: "If there be, on the face of the agreement, an illegal intention, is it too much to say, that the burden lies on the party who uses expressions primâ facie importing an illegal purpose, to shew that the intention was legal?" *Harrington* v. *Kloprogge* (*d*) decides merely that, where a party agrees to assign any office of which he may become possessed, this will be construed as having in view only assignable offices.

(*a*) 1 *Smith's Lea. Ca.* 169. (*b*) 2 *New Ca.* 634. 646.
(*c*) 1 *B. & Ald.* 53.
(*d*) 2 *Br. & B.* 678.

Haines v. *Busk* (*a*) was the case of an action by a broker against his principal for commission: and the decision was merely that the principal could not set up as a defence that what was done for him by the broker would be illegal unless he, the principal, took certain steps. *Elworthy* v. *Bird* (*b*) shews that on discontinuance of an indictment, technically speaking, requires the act of the Attorney General: under what circumstances this can be the foundation of a contract is not decided. All that Lord *Hardwicke* did in *The Mayor, &c. of York* v. *Pilkington* (*c*) was to prevent parties who were plaintiffs before him from prosecuting the same matter criminally in a Court where they would themselves have been judges. *Rex* v. *Fielding* (*d*) shews nothing as to the terms on which a prosecution may be put an end to: it contains only an intimation that the Attorney General would probably stay it when the prosecutor had commenced a civil action. It is true, as the plaintiff contends, that the declaration is not answered unless the illegality appear plainly: but it does so here. The question is, not merely whether it be an offence to forbear prosecuting for a misdemeanour, but whether the law will enforce a contract to pay money for such forbearance. The difficulty of distinguishing between different kinds of misdemeanour has been urged on the other side. There is, no doubt, such a difficulty: and, if the question were quite new, probably the Courts would hold it illegal to compromise for money any prosecution whatever. This seems to be the view of *Alderson* B. in *Garth* v. *Earnshaw* (*e*). At the utmost, the legality

(*a*) 5 *Taun.* 521.
(*b*) 2 *Bing.* 258.
(*c*) 2 *Atk.* 302.
(*d*) 2 *Bur.* 719.
(*e*) 3 *Young & C. Exch.* 584.

must be confined to cases in which the whole matter of the indictment is such as to admit of satisfaction by a payment to the prosecutor.

As to the cases cited in the earlier part of the argument for the plaintiff. *Rex* v. *Crisp* (*a*) was a decision only on the statute 18 *Eliz. c.* 5. *Williams* v. *Hedley* (*b*) is rather in favour of the defendants; for it was there held that money paid to compromise a prosecution for misdemeanour might be recovered back, the objection being that the person paying was particeps criminis, which the Court overruled on the ground that he was not an informer, a plaintiff, or a party suing out process, so as to be within the prohibition of stat. 18 *Eliz. c.* 5. *ss.* 3, 4. In *Johnson* v. *Ogilby* (*c*) no more appears than a suggestion of counsel, not expressly adopted by the Court; and from Mr. *Cox*'s note (1) there it rather seems that the Court disallowed it. In 1 *Story's Equity Jurisprudence*, pp. 297, 298. s. 294. (ed. 3. 1843. *Boston*), it is said: "Agreements, which are founded upon violations of public trust or confidence, or of the rules, adopted by Courts in furtherance of the administration of public justice, are held void." "Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice." The report of *Drage* v. *Ibberson* (*d*) in *Espinasse* is probably incorrect: it states that Lord *Kenyon* said "he should adhere to the class of cases which held, that the consideration being the settling a misdemeanour, might be good in law:" but there is no such class. The nonsuit in that case may, however, be supported on

(*a*) 1 *B. & Ald.* 282.
(*b*) 8 *East*, 378.
(*c*) 3 *P. Wms.* 279.
(*d*) 2 *Esp. N. P. C.* 643.

another ground: however incorrect the transaction, trover would not lie for the paper on which the note was written, inasmuch as the property was parted with, though the note itself might be one which could not be indorsed. The cases cited from *Kyd* on *Awards* seem to suggest a sound limitation: namely, that no compromise should be allowed except when, there having been a conviction, the Court, though it suspends the judgment or inflicts only a nominal punishment, retains in its own hands the controul of the proceeding till it comes to its technical close. There seems, also, to be no objection to parties being bound over not to commit an offence. *Rex* v. *Lord Falkland* (*a*) appears to have been a hasty proceeding, not well considered. *Edgcombe* v. *Rodd* (*b*) has not been distinguished: the reasoning of *Le Blanc* J. cannot be answered. It does not appear that in *Fallowes* v. *Taylor* (*c*) there was more than a bond conditioned to remove the nuisance: no stipulation to abstain from prosecuting appears. It is admitted that *Pool* v. *Bousfield* (*d*) is a direct authority for the defendants. *Beeley* v. *Wingfield* (*e*), *Baker* v. *Townsend* (*g*) and *Kirk* v. *Strickwood* (*h*) are explainable on the ground already pointed out: there had been convictions in all those cases. There was also a conviction in *Elworthy* v. *Bird* (*i*): and, besides, the argument there seems to have turned on the distinction between different kinds of assault: it was not suggested that an indictment for a riot or for an assault on a public officer could be compromised. This case therefore must be decided on

(*a*) *Kyd on Awards*, 66. 2d ed.
(*b*) 5 *East*, 294.
(*c*) 7 *T. R.* 475.
(*d*) 1 *Campb.* 55.
(*e*) 11 *East*, 46.
(*g*) 7 *Taun.* 422.
(*h*) 4 *B. & Ad.* 421.
(*i*) 2 *Sim. & Stu.* 372.

the principle affirmed in *Collins* v. *Blantern* (*a*). It is immaterial whether the defendant was guilty or not: if he was, the prosecution ought not to have been compromised; if he was not, it ought not to have been instituted, or to have been persevered in, and the abandonment of it can be no consideration. The authorities are collected in *Chitty* on *Contracts*, p. 674. (3d ed.)

Bliss, in reply. Only one of the indictments in *Elworthy* v. *Bird* (*b*) had been prosecuted to conviction when the compromise took place. The difficulty felt by *Alderson* B. in *Garth* v. *Earnshaw* (*c*) seems to have arisen, not from the compromise of the indictment, but from the relation of husband and wife: the report is, however, very unsatisfactory. The distinction between cases where there has, and those where there has not, been a conviction will not account for the distinction between felonies and misdemeanours. Even in the case of a conviction it would be in the power of the prosecutor to abstain from bringing the defendant up for judgment. The class of cases adverted to by Lord *Kenyon* in *Drage* v. *Ibberson* (*d*) is sufficiently shewn by *Collins* v. *Blantern* (*a*) and *Johnson* v. *Ogilby* (*e*), and by the notorious practice of compromising assaults. The authorities cited in the latter part of the argument for the plaintiff were not brought forward as establishing the general legality of compromises: the answers given to them are therefore inapplicable. *Haines* v. *Busk* (*g*)

(*a*) 2 *Wils.* 341. 347.
(*b*) 2 *Sim. & Stu.* 72.
(*c*) 3 *Young & C. Exch.* 584
(*d*) 2 *Esp. N. P. C.* 643.
(*e*) 3 *P. Wms.* 279.
(*g*) 5 *Taun.* 521.

was not decided on the ground now suggested for the defendants, but on the legality of the compromise.

Cur. adv. vult.

TINDAL C. J., in this vacation (*June* 13th), delivered the judgment of the Court.

This was an action on an agreement, by which the defendants, in consideration (inter alia) that the plaintiff, being the prosecutor of an indictment preferred against certain persons for an assault and riot, would not proceed further on such indictment, undertook and promised plaintiff to pay him a certain amount of money.

The declaration averred that, in pursuance of such agreement, the plaintiff did not proceed further with the indictment, and did, with the assent of the then defendants, inform the Court, before which the indictment was pending, of the premises, and, by leave of the Court, forbore to give evidence upon the indictment; and that thereupon the said defendants in such indictment were acquitted.

The defendants pleaded several pleas to this action; but the most material plea is that which raised the question, whether the consideration for the said supposed promise was illegal and the promise therefore void.

Upon demurrer, the Court of Queen's Bench held this to be so: and the same question has been argued before us on the writ of error. And we think the judgment of the Queen's Bench was right.

It seems clear, from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal con-

sideration. Such was the case of *Collins* v. *Blantern* (*a*), which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of *Johnson* v. *Ogilby* (*b*) as stated in *Peere Williams's Reports*. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanour seems to have been the foundation of the decision, if it was made, by Lord *Talbot*, a distinction overruled in *Collins* v. *Blantern* (*a*), which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one: and perhaps the case may be so explained. If not, it cannot, we conceive, be sustained as law.

In *Drage* v. *Ibberson* (*c*), however, Lord *Kenyon* adverted to, and stated that he should adhere to, the class of cases which held that the consideration for an agreement, being the settling of a misdemeanour, might be good in law. Thus a settlement of an indictment for a nuisance, preferred by public authority, was held (*d*) a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the Court seem to have

(*a*) 2 *Wils.* 341. 347.
(*b*) 3 *P. Wms.* 277. 279.
(*c*) 2 *Esp. N. P. C.* 643.
(*d*) *Fallowes* v. *Taylor*, 7 *T. R.* 475.

overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe* v. *Rodd* (*a*) *Le Blanc* J. assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanour and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes* v. *Taylor* (*b*); nor can *Pool* v. *Bousfield* (*c*) be reconciled with it. There an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal.

But there is a class of cases, such as *Beeley* v. *Wingfield* (*d*) and *Baker* v. *Townsend* (*e*), which do not at all break in upon sound principles. These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As *Gibbs* C. J., in the latter case, well observes, "the parties have referred nothing but what they have a right to refer. They have referred the several assaults" (by which we understand him to mean their several rights to damages for those assaults); "these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute *refers all other their civil rights;*" which words shew our previous interpretation to be correct. The case of *Beeley* v. *Wingfield* (*d*) was after conviction; and the promissory note seems merely

(*a*) 5 *East*, 294.
(*b*) 7 *T. R.* 475.
(*c*) 1 *Camp.* 55.
(*d*) 11 *East*, 46.
(*e*) 7 *Taun.* 422.

to have been given for the expences of the prosecution, and was obviously a part of the punishment inflicted by the Court after conviction of the offence.

Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were res integra, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further.

In the case before us, the offence is an assault coupled with *riot* and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence.

Nor do we think that the assent of the Judge was material.

We entirely agree in the observations of the Court of Queen's Bench as to this part of the case: and we think the judgment of the Queen's Bench must be affirmed.

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

PARTRIDGE *against* The Governor and Company of the Bank of ENGLAND.

Declaration alleged that plaintiff was proprietor of a share in the 3½ reduced annuities, in

CASE. The 1st count of the declaration stated that plaintiff was proprietor of and entitled to a certain share or interest, to wit 3083*l.* 4*s.* 3*d.*, in a certain public

the management of defendants (Governor &c. of *The Bank of England*) for certain reward &c., and was entitled to receive certain dividends, his share standing in the books for the purpose of their paying him, on request, the accruing dividends, when sufficient money had been received by them: whereupon defendants became liable, and it was their duty, to pay plaintiff on request, when sufficient money had been received by them, all dividends due to him: that, while plaintiff was possessed of the share, a dividend became due to him, and sufficient money had been received by defendants &c., and they were requested by plaintiff to pay him his dividend, and a reasonable time had elapsed: but they had not paid.

Plea: that by usage and custom of bankers and merchants in *London*, for divers, to wit sixty, years past, the drafts of defendants upon their cashiers, called dividend warrants, are transferable and assignable by delivery only, and a bonâ fide holder thereof is entitled to payment by defendants on demand: that *W.* had received from defendants such warrant for payment of the dividend in question, under a power of attorney from plaintiff, authorizing *W.* to receive and give receipts for dividend, and had delivered the warrant to *L.* for good consideration then moving from *L.* to *W.*, and that *L*, while lawful holder of the warrant, had demanded payment from defendants and required them to hold the money for his use.

Held, by the Court of Q. B., on a replication traversing the above allegations, except the execution of the power and delivery to *W.*;

1. That the allegation of usage was satisfied by proof that dividend warrants, with the receipt subscribed, are passed from hand to hand like bank notes, and are paid by the Bank cashiers to any one who presents them after a certain day:

2. That the alleged consideration was proved by shewing that, before the dividend was due, *L.*, a banker, had discounted a promissory note of and for *W.*, his customer, payable on a day subsequent to the delivery of the warrant by *W.* to *L.*, and that the warrant was delivered to secure payment to *L.* of the note when due; although at the time of delivery the cash balance at *L.*'s bank was in favour of *W.*, and the note was not due till after the day for payment on the warrant.

But, Held, by the Court of Exchequer Chamber, that the plaintiff was entitled to judgment on the record: because,

1. The power, as pleaded, did not authorize receiving payment by a warrant: and it did not appear, by plea or by any statute, that it was a usual mode of paying dividends to give a warrant.

2. It did not appear that defendants had become liable to pay *L*, the warrant not being negotiable by the general law, and the supposed custom not appearing to be an immemorial custom in the particular place, nor an usage of trade of which plaintiff was cognisant.

3. *L.* was not averred to be a bonâ fide holder, but only to have taken for value; and the averment, as above, of his being lawful holder, did not supply the defect.

stock called the *3l.* 10*s.* per cent. reduced annuities &c., transferable at defendants' bank, and in their care and management for certain reward &c.: and that plaintiff was entitled to receive in respect thereof interest or dividends on 5th *April* and 10th *October* in each year. That, at the time of the grievances &c., the said share &c. of plaintiff was standing in defendants' books in his name, and in their care and management for the purpose of paying to him on request, when sufficient money had been issued by Her Majesty and received by defendants for that purpose, all dividends and interest from time to time due to plaintiff in respect of his share in the said stock, whilst such share was not transferred by plaintiff's authority; by reason whereof defendants became liable, and it was their duty, to pay plaintiff on request, when sufficient money had been issued and received by them &c., all dividends &c. from time to time due to plaintiff. The count then averred the accruing, to wit 5th *April* 1841, of the half-yearly dividend of (to wit) *53l.* 19*s.* 1*d.* due to plaintiff; the issuing, and receipt by defendants, of sufficient money &c.; request by plaintiff to pay, and refusal by defendants, although a reasonable time had elapsed &c. The 2d count was for nonpayment of a dividend due on other stock of the plaintiff. The 3d count, in trover, for two pieces of paper with print and writing thereon, called dividend warrants, purporting to be orders &c., addressed to the cashiers of defendants' bank, to pay plaintiff the sums of &c.

Pleas. 1. Not guilty. 2. To the last count, Not possessed. 3. To the first count, that, whilst plaintiff was entitled to the said share or interest &c., and to receive the interest &c. thereon, and before the said half yearly interest or dividends became due to plaintiff, to wit on

&c., plaintiff, by his letter of attorney under seal (profert), appointed *W. Steer* and *F. Wakefield* his attorneys, jointly and separately, in his name and on his behalf, to accept transfers &c., and to receive and give receipts for all dividends then or thereafter due, and to do all lawful acts requisite for effecting the premises, plaintiff thereby ratifying and confirming all their acts done by virtue thereof: delivery of said letter of attorney by plaintiff to *Wakefield* and notice thereof by *W.* to defendants, and demand to act by virtue &c.: That, when the dividend became due, the letter of attorney was in full force: that, when the dividend was so due, and before plaintiff had requested defendants to pay it, *Wakefield*, under authority of the letter of attorney, demanded of defendants that they should pay him, as such attorney, the dividend: that thereupon defendants did, at the request of *Wakefield*, deliver to him, and he then accepted and received from defendants, in payment of the dividend, a draft or order in writing of defendants, addressed to the cashiers of defendants' bank, commonly called a dividend warrant, whereby the cashiers were directed to pay plaintiff the dividend: and that *Wakefield* did then, by virtue of the power &c., as such attorney of plaintiff, on receipt of such warrant, give defendants his receipt for the said dividend. That, "according to the usage and custom of bankers and merchants used and approved in *London* for divers, to wit sixty, years now last past, all such dividend warrants as in this plea mentioned are, by the said usage and custom, transferable and assignable by delivery only and without indorsement, and that the bonâ fide holder of every such dividend warrant has been during all the

time aforesaid, and still is, according to such usage and custom, entitled to receive payment of the said sum of money, in each such dividend warrant expressed, from the said defendants on demand." That, after *Wakefield* had received the warrant, and whilst the money for payment thereof was in the hands of defendants, and before they were requested by plaintiff to pay the dividend, to wit on &c., *Wakefield*, according to the said usage and custom, transferred and delivered the warrant to *Henry Ladbroke* &c., then carrying on the business of bankers in *London*, by the style and firm of *Messrs. Ladbroke & Company*, for certain valuable considerations then moving from *Messrs. Ladbroke & Company* to *Wakefield:* by means whereof, and according to the usage and custom, *Messrs. Ladbroke & Company* became entitled to receive from defendants the sum expressed in the warrant. That, after such transfer and delivery of the warrant and while *Messrs. Ladbroke & Company* were lawful bearers and holders of such warrant, and before plaintiff requested defendants to pay &c., *Messrs. Ladbroke & Company* demanded of defendants payment of the money expressed in the warrant, and then required defendants to hold the same for the use and benefit of *Messrs. Ladbroke & Company;* wherefore defendants refused to pay the dividend to plaintiff; as they lawfully &c.; which is the said supposed &c. Verification. There was a like special plea to the second count.

The Replication to each special plea, after admitting the execution, delivery and notice of the letter of attorney, and the demand of *Wakefield* to act by virtue thereof and that defendants should pay him the dividends by virtue of the letter of attorney, in manner and

form &c. traversed, with an absque &c., the residue of the causes or matters of excuse in the plea alleged. Conclusion to the country. Issue thereon.

The cause was tried at the *London* sittings after *Trinity* term 1843, before Lord *Denman* C. J. It appeared that, in *March* 1841, *F. Wakefield*, a stock broker, applied to *Ladbroke & Co.* bankers in *London*, to discount his promissory note for 2000*l.*, stating that certain dividend warrants, including those referred to in the declaration, would be handed to them in *April* when received by him at the Bank, which would be a further security for payment of the 2000*l.* The note was payable on 21st *April* 1841. The dividends were due on 5th *April.* On 6th *April Wakefield* received the dividend warrants at the Bank under his power of attorney, with his receipt subscribed as attorney for the plaintiff, and on the same day handed them to *Ladbroke & Co.* At that time the balance at *Ladbroke & Co.*'s was in favour of *Wakefield.* On 7th *April*, *Ladbroke & Co.*, who had a banking account with defendants, delivered the warrants to them, to be entered to their credit. The amount was accordingly entered on that day to the credit of *Ladbroke & Co.* in defendants' cash book, and the warrants cancelled; but the amount never was carried to their drawing account in the ledger. If presented to the cashiers of the Bank, the warrants would not, in the ordinary course, have been paid before 8th *April. Wakefield* became embarrassed on 6th *April*, and absconded; and this was notorious on the 7th: but neither *Ladbroke & Co.* nor defendants had notice of plaintiff's claim till some time after the 8th. *Wakefield*'s note was dishonoured when due. If it had been paid, there would have been a balance of 200*l.* at *Ladbroke & Co.*'s

in his favour: when it was dishonoured, there was due to them from him 1798*l.* 9*s.* 8*d.* The form of a dividend warrant is described, p. 406, post. The stockholder or his attorney is required to subscribe a receipt at the foot of it before it is delivered to him at the Bank. It was proved that such a dividend warrant, with the receipt subscribed, was currently received as cash, and would be paid by the cashiers of the Bank to any one who presented it on or after 8th *April.* The verdict of the jury was as follows. "We find that dividend warrants are payable to the parties presenting the same, but are not negotiable before the day of payment to the public by the Bank. It does not appear that Messrs. *Ladbroke* gave any specific consideration for the warrants lodged with them by Messrs. *Wakefield.*" A verdict was entered for plaintiff on all the issues, but leave given to move to enter a verdict for defendants. Damages were assessed severally on the 1st and 2d counts. In the following term a rule nisi was obtained to enter a verdict for the defendants on the special pleas, and on the plea of Not possessed to the count in trover; or for a new trial. In *Easter* term, 1844 (*a*),

Erle and *Crompton* shewed cause. They contended that there was no consideration "then moving" from *Ladbroke & Co.* to *Wakefield*, when the dividend warrants were handed to the former. The only consideration was the discounting a note in *March*, which did not become due till after the warrant was handed over; and, if the note had been then duly honoured,

(*a*) *May* 4. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Wightman* Js.

the balance would have been largely in favour of *Wakefield*. There was no subsisting debt due from him to his bankers on 6th *April*, when he delivered the warrant to them. As to the allegation of the usage and custom of bankers and merchants, the finding by the jury that a dividend warrant, with the proper receipt on it, is negotiable, and paid to any one who presents it, after the 7th *April*, does not support the averment that all dividend warrants are assignable by delivery and without indorsement, and that a bonâ fide holder is entitled to payment. To be assignable imports that the assignee can, as such recover the amount, whereas the holder only receives payment from the Bank as agent of the person named in the warrant; nor would payment be made to a bonâ fide holder, or even to an attorney who had been duly authorised, if the principal revoked the authority and required payment to himself. Here no payment was ever in fact made; nor were *Ladbroke & Co.* credited on their drawing account, which might be equivalent to payment. Besides, if the instrument is not, in its own nature and in form, a negotiable one, no amount of proof of usage can make it so. It is mere matter of law; and the jury cannot, on such evidence, find that it is negotiable. An equitable lien on it, supposing that to exist, will not support the plea. If the defendants are not discharged from payment, then they improperly detain the dividend warrant, and the plaintiff is entitled on the issue of "Not possessed" (*a*).

(*a*) So much of the argument as turned on the negotiability of dividend warrants is here only shortly stated, because the point was more fully argued in Error.

Kelly, contrà. Until repayment of the money advanced on the note there was a continuing consideration; for the deposit of the warrants and the original agreement, in virtue of which the transfer was made, need not have been contemporaneous. Then the evidence of usage entitled the defendants to a verdict on the special plea. Strictly speaking, the dividend is payable on the 5th; and the nonpayment till the 8th is for the mere convenience of the Bank. The warrant is transferable before. It is in form payable only to the stockholder; but his receipt cures this, and converts it into a warrant payable to bearer, like a banker's cheque or exchequer bill; *Wookey* v. *Pole* (*a*), *Brandão* v. *Barnett* (*b*). Whether the bearer can or cannot sue for the amount in his own name, does not determine the point of negotiability; for an instrument may be legally assignable, although no action lies on it at all: thus the holder of an exchequer bill cannot sue the Government; nor does any action lie for a dividend, nor by the bearer of a cheque against the banker. But it is not clear that an action would not lie against the defendants at the suit of *Ladbroke & Co.*, credit having been given to them. If the defendants were justified in paying *Ladbroke & Co.*, then the credit given to them in account is tantamount to payment, and the defendants are entitled to possession of the warrants. Therefore the verdict on the plea to the last count ought to be entered for them.

Cur. adv. vult.

(*a*) 4 *B. & Ald.* 1.

(*b*) 1 *M. & G.* 908. Judgment reversed in Exch. Ch.; *Barnett* v. *Brandão*, 6 *M. & G.* 630. Judgment of Exch. Ch. reversed in Dom. Proc.; *Brandão* v. *Barnett*, 3 *C. B.* 519.

PARTRIDGE v. Bank of ENGLAND.

Lord DENMAN C. J., in *Trinity* vacation 1844 (*June* 27th), delivered judgment.

This was an action on the case by the plaintiff, a proprietor of 3½ per cent. and 3 per cent. stock, against the defendants for breach of duty in refusing to pay to the plaintiff the dividend due to him in respect of his stock on 5th of *April* 1841. There were two special counts, and a count in trover. (His Lordship then stated the substance of the pleadings.)

It appeared, by the evidence at the trial, that the dividends were due on the 5th of *April*: That the defendants had previously received money from the exchequer for the payment: That, on the 6th, *Wakefield*, under a power of attorney from the plaintiff, received the dividend warrants: That, on the same day, the warrants were delivered by *Wakefield*, on his own account, to Messrs. *Ladbrokes*, who were his bankers: That, on the 7th of *April*, *Ladbrokes* (who had a banking account with the defendants) delivered the warrants to them to be carried to their credit, and that the amount of such warrants was on that day entered in the cash book of the defendants to the credit of *Ladbrokes*, but was not then or at any time carried to the drawing account of *Ladbrokes* with the defendants. The cashiers of the Bank of *England* would not pay the dividend warrants till the 8th. It also appeared that *Wakefield* absconded on the 6th of *April*, and that that circumstance was generally known on the 7th; but there was no proof of any notice to *Ladbrokes* or the defendants of any claim by the plaintiff till long after the defendants had credited the account of *Ladbrokes* with the amount of the warrants.

There was evidence that dividend warrants, after they were received at the Bank, and before payment, were taken as cash and passed from hand to hand as freely as bank notes.

It also appeared that, in *March* 1841, *Ladbrokes* had discounted for *Wakefield* a promissory note of his for 2000*l.*, which fell due on the 21st of *April*, 1841, and was dishonoured. Had the note been paid, there would have been a balance in favour of *Wakefield* of upwards of 200*l.*; but, when dishonoured, there was owing to *Ladbrokes* from *Wakefield* 1798*l.* 9*s.* 8*d.* At the time of the discounting the note, *Wakefield* referred to the dividend warrants which he should hand over to *Ladbrokes* when received by him in *April*, as affording means for payment of the note.

At the trial, a verdict was taken for the plaintiff with liberty for the defendants to move to enter a verdict for them, if the Court should be of opinion that, upon the facts as they appeared at the trial, the verdict ought to have been found for them upon the special pleas. A motion was accordingly made, in last *Michaelmas* Term, to enter a verdict for the defendants, or for a new trial.

Upon the argument, two questions were raised: first, Whether a dividend warrant was a negotiable instrument assignable by delivery, so as to give the assignee a right to the dividend mentioned in it: secondly, Whether the evidence of the consideration between *Ladbrokes* and *Wakefield* supported the statement in the plea.

Upon the first of these questions, the argument on the part of the plaintiff rested entirely upon the form of the instrument called a dividend warrant, which is as follows.

120th No. 28729. Reduced 3*l.* per cent. annuities. 28237.

To the Cashiers of the Bank of *England*.

Pay to *Joseph Ashby Partridge*

The sum of thirty-seven pounds ten shillings.

£37 10*s.* 0*d.*

for half a year's annuity, which became due the 5th day of *April*, 1841, on the sum of 2500*l.* interest or share in the capital or joint stock of Reduced Annuities at 3*l.* per cent. per annum, consolidated by acts of parliament of the 25th and 26th of *George* 2. and the 5th and 21st of *George* 3., and by other subsequent acts, charged on the sinking fund. *J. Gretton.*

Exd. *W. Hill.*

I do hereby acknowledge to have received of the Bank of *England* the above mentioned sum, in full payment for half a year's annuity, due as abovesaid. Witness my hand this 6th day of *April*, 1841,

Witness, *G. Ellis.* *F. Wakefield* attorney.

In this instrument there are no terms which would make it negotiable: it is not payable to bearer, to order, or to assignees, but to *Partridge*, the present plaintiff. There is, however, an acknowledgment at the foot of the warrant by the payee, or, as in this case, by his attorney, that he has received the sums mentioned in the warrant in full payment.

This acknowledgment is required from the person receiving the warrant from the payee or his attorney, before the Bank will part with it. After that acknowledgment, the cashiers of the Bank, to whom the warrant is addressed, would have paid any body who presented it; the admission of the payee having virtually, as far as the Bank is concerned, the effect of making the warrant payable to bearer.

If *Ladbrokes* had applied for payment to the cashiers of the Bank, and been actually paid, and the warrant had been given up to the Bank upon such payment, no action would have been maintainable against the Bank. But, in the present case, the defendants do not allege payment of the warrants to *Ladbrokes*, but only that they hold them for the use and benefit of *Ladbroke & Co.* And the question therefore is, whether *Ladbrokes* would have a right to hold the warrants, the amount mentioned in them being still unpaid, against the plaintiff.

This, as far as regards the first point made upon the argument, depends wholly upon the custom stated in the plea, founded probably upon the peculiar nature of the instrument, combining an order to pay with a receipt by the payee, which enables the cashiers of the Bank safely to pay any person who may present it.

We are of opinion that there was sufficient evidence of the existence of the custom stated in the plea, to warrant a verdict for the defendants as far as the custom was concerned: and the only remaining question is, whether there was evidence of consideration from *Ladbrokes* to *Wakefield*, to support the averment in the plea.

Wakefield is there stated to have transferred the warrants to *Ladbrokes*, on the 7th of *April*, for valuable consideration then moving from *Ladbrokes* to *Wakefield*; but the only consideration proved was the discount of the 2000*l.* in the previous *March*.

What passed, however, on that occasion, appears to us to constitute a continuing consideration existing at the time the warrants were transferred and delivered to *Ladbrokes* by *Wakefield*, and that the evidence does support the averment in the plea that the warrants were

transferred and delivered to *Ladbrokes* for valuable consideration *then* moving from them to *Wakefield.*

We are therefore of opinion that the verdict ought to be entered for the defendants on the special pleas to the first and second counts: and, with respect to the plea of "Not possessed" to the count in trover, we think the case, on the part of the defendants, rests on the same grounds as on the special pleas, and that the verdict must be entered for the defendants.

Upon the whole, therefore, the verdict will be entered for the defendants upon all the issues, except that upon Not guilty, which will still stand for the plaintiff (*a*).

The verdict having been entered accordingly, and judgment having been entered for the defendants on all the counts, the plaintiff brought error in the Exchequer Chamber; the error assigned being that the third and fourth pleas were not sufficient in law to prevent the plaintiff from having judgment on the first and second counts.

Joinder in error.

The case was argued in *Michaelmas* vacation, 1845 (*b*).

Crompton for the plaintiff in error (the plaintiff below). As the third and fourth pleas are alike, it will be sufficient to discuss the third only. The damages are assessed on the first two counts only, to which the third and fourth pleas are respectively pleaded; the third count being answered by the traverse which is found for the defendants.

First, the power of attorney, set out on the record,

(*a*) The case, thus far, is reported by *Edward Smirke*, Esq.

(*b*) *November* 26th and 27th. Before *Tindal* C. J., *Coltman*, *Maule* and *Cresswell* Js., and *Alderson*, *Rolfe* and *Platt* Bs.

did not authorise the attorney to receive by a dividend warrant, or the Bank to pay in that way. Even if the warrant were a negotiable instrument, there would be no such authority. *Attwood* v. *Munnings* (*a*) shews how strictly a power of attorney is construed. [*Tindal* C. J. The attorney is authorised to give receipts: does not that make his receipt binding? The money is never paid at the Bank till the receipt is written on the dividend warrant.] The authority is not to receive one thing and give a receipt for another. [*Maule* J. The party receiving the dividend warrant signs the receipt on the warrant, and himself takes the instrument: he gives it up when the payment is made in cash; that is the giving of the receipt.] The record shews that the Bank had notice of the power. This is a power without an interest, which is always construed strictly. *Hogg* v. *Snaith* (*b*) is another instance of the strictness with which a power of attorney is construed: *Chambre* J. there said, "the evidence of the usage ought never to have been received for the purpose of altering the operation of a written instrument." *Hay* v. *Goldsmidt* (*c*), cited in that case, and *Murray* v. *The East India Company* (*d*), are other instances to the same effect. In *Ward* v. *Evans* (*e*) a creditor sent his servant to the debtor to receive money; the debtor gave a cheque to the servant, who accepted it; the drawee honoured all drafts on him throughout the day; the cheque was presented by the servant on the next day, when payment was refused: and it was held that, the creditor not having been shewn to have acquiesced in, or known of, the taking of the cheque,

(*a*) 7 *B.* & *C.* 278.
(*b*) 1 *Taun.* 347.
(*c*) 1 *Taun.* 349.
(*d*) 5 *B.* & *Ald.* 204. 210.
(*e*) 2 *Ld. Raym.* 928.

the debtor was not discharged. That case applies here; for there is nothing on the record shewing that by custom dividends can be paid by warrants. Nor is any acquiescence by the plaintiff averred: such an averment would have been traversed. In *Barker* v. *Greenwood* (*a*) it was said by *Alderson* B. that, where a creditor's agent is bound to pay the whole over to the principal, he must receive it in cash from the debtor; and that a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. Here, it will be argued, the money itself might have been received immediately on the warrant being given to the agent. But, till the cash is obtained, the payment is not made. If a party, on receiving a dividend warrant, went immediately to the cashier, but, in going thither, had the warrant stolen from him, the Bank would not be discharged. Even supposing that, if the thief had obtained the money before the real owner gave notice to the Bank, the Bank might insist, as against the owner, that the thief was his agent, still, where the notice is given (as here) before the money is paid, the authority is revoked. In *Sykes* v. *Giles* (*b*) it was held that a general authority to receive payment does not include an authority to take a bill of exchange as payment. No stress can here be laid upon a fact which was insisted upon in the argument below, that there is a receipt on the warrant itself: that does not appear by the record. As to the usage set up, the plaintiff is not shewn to be cognizant of it, and will not be bound by it; *Scott* v. *Irving* (*c*). There the question turned on the position

(*a*) 2 *Y. & Col. Exch.* 414. 419.
(*b*) 5 *M. & W.* 645.
(*c*) 1 *B. & Ad.* 605.

of an insurance broker as agent for the assured; and *Parke* J. said: "The authority of the broker is primâ facie to receive payment in money. *Mitchell*, therefore, was the agent of the assured to receive payment from the underwriter in cash, or that which was equivalent to payment in cash. A special authority may be given by the assured to the broker to receive payment in some other mode, and such authority may be inferred from facts, or from some usage to which the assured has assented: and here there is some evidence of a usage prevailing between the broker and the underwriter; but the plaintiff was not cognizant of that usage." *Bartlett* v. *Pentland* (*a*) and *Russell* v. *Bangley* (*b*) are to the same effect. [*Maule* J. mentioned *Stewart* v. *Aberdein* (*c*).] The usage there was pleaded and also the assent of the principal. In *Hogg* v. *Snaith* (*d*) the Court of Common Pleas considered that the usage alone would not be enough. The usage here, even if properly] pleaded, could not carry the value of the warrant higher than that of a bill of exchange: and a payment by a bill would have been unauthorised.

Secondly, this warrant could not be a negotiable instrument, by any custom of merchants, so as to give the assignee a legal title to the money. It has no words of negotiability. [*Maule* J. mentioned *Renteria* v. *Ruding* (*e*).] That case is remarked upon by Mr. *Smith* in his notes (*g*) on *Miller* v. *Race* (*h*): it was the case of parties to whom a bill of lading, which did not men-

(*a*) 10 *B. & C.* 760.
(*b*) 4 *B. & Ald.* 395. See *Todd* v. *Reid*, 4 *B. & Ald.* 210.
(*c*) 4 *M. & W.* 211. (*d*) 1 *Taun.* 347.
(*e*) *Moo. & M.* 511.
(*g*) 1 *Smith's Lea. Ca.* 250. 260. (*h*) 1 *Burr.* 452.

tion assigns, had been indorsed; and they were held, after they had taken the goods under it, to be liable for the freight. The bill required the goods to be delivered to the consignee "on being paid freight." Mr. *Smith*'s conclusion is that, though the parties "might not be, properly speaking, indorsees of the bill; still as they exhibited it, and claimed to receive the goods in pursuance of it, they might fairly be taken to have assented to its terms, so that a promise to pay the charge therein imposed might be implied." So explained, the case is inapplicable here. The bill of lading constitutes an indicium of property in the goods: it leads to a sort of attornment by the holder of them. The property in the goods passes by the transaction, but the original contract does not pass; *Thompson* v. *Dominy* (*a*). In *Wookey* v. *Pole* (*b*) three Judges of this Court (*Bayley* J. dissenting) held that an exchequer bill, containing the words "this bill entitles or order," and "if the blank is not filled up, the bill will be paid to bearer," was negotiable, the blank not having been filled up, and that the property in it passed by delivery. Here are no such words. It is true that, in *Lang* v. *Smyth* (*c*), *Tindal* C. J. enumerates dividend warrants with other instruments which are in the nature of currency; but that was said, not as laying down such a law with respect to the warrants, but by way of illustration of the questions upon this point into which judges will enter as matters of law and not fact. [*Tindal* C. J. Certainly, that was all. *Maule* J. Can a man have the power of making an instrument negotiable by adding the words "or order," if it be not negotiable in itself?] He has no

(*a*) 14 *M. & W.* 403.
(*b*) 4 *B. & Ald.* 1.
(*c*) 7 *Bing.* 284. 293.

such power, except in the case of those instruments upon which the law merchant, or some statute, or the law of a foreign country where the instrument is made (*Gorgier* v. *Mieville* (*a*)), has conferred the property of becoming negotiable by the insertion of such words. Even then English instruments require the words; *Plimley* v. *Westley* (*b*), *Wain* v. *Bailey* (*c*). The cases are well collected in Mr. *Smith*'s note on *Miller* v. *Race* (*d*). [*Maule* J. Suppose a creditor irrevocably assigns a debt: the assignee may not be able to bring an action at law against the debtor; but cannot the debtor set up this as an answer to an action by the creditor?] This is not the case of an irrevocable assignment: it is a power of attorney without an interest in the attorney. If there were such an assignment, it would confer only an equitable interest, which the Courts will not notice. *Bottimley* v. *Brook* (*e*) may be referred to as an authority to the contrary: but that case is overruled; *Tucker* v. *Tucker* (*g*). The parties indeed might meet and agree to the debtor becoming the debtor of the assignee: but, in order to make this a discharge as against the original creditor, it is necessary that there should be a new and distinct contract making the debtor liable to the assignee; *Williams* v. *Everett* (*h*). *Hodgson* v. *Anderson* (*i*) is an instance of such a transfer of legal rights and liabilities. Besides, the plea does not rest the defence on any authority, properly speaking, but on the negotiability. The Court will disallow an unreasonable local custom,

(*a*) 3 *B. & C.* 45.
(*b*) 2 *New Ca.* 249.
(*c*) 10 *A. & E.* 616.
(*d*) 1 *Smith's Lea. Ca.* 258.
(*e*) 1 *T. R.* 621, cited in *Winch* v. *Keeley*.
(*g*) 4 *B. & Ad.* 745. 751, 2.
(*h*) 14 *East*, 582. See cases in note (*a*) to *Forth* v. *Stanton*, 1 *Wms. Saund.* 210 *a*. 6th ed.
(*i*) 3 *B. & C.* 842.

even after verdict; *Leuckhart* v. *Cooper* (*a*); and will not admit evidence of a custom of merchants contrary to the custom established by legal decisions; *Edie* v. *East India Company* (*b*).

But, thirdly, it is not shewn that the plaintiff here was within the custom. It does not appear that the transaction took place in the city of *London*, nor that the plaintiff resided there. [*Tindal* C. J. I think we must go so far as to notice that the Bank is in London: there must be some statutes recognising this. *Maule* J. It is not said that the custom was in force at the time: besides, "divers to wit sixty years" may mean any time, long or short.]

Fourthly, the custom, to be good, ought at least to be confined to cases where the holder of the warrant has given value for it. It cannot be enough that he holds bonâ fide. The custom, as pleaded, would give a greater effect to the dividend warrant than a bill of exchange has. The giving value and the taking in good faith are very distinct facts, as appears from *Goodman* v. *Harvey* (*c*), where several cases are collected. *Foster* v. *Pearson* (*d*) in this respect illustrates *Goodman* v. *Harvey* (*c*). The bona fides may perhaps correspond to market overt in the case of a chattel; but a gift in market overt would not pass a chattel as against the real owner. [*Tindal* C. J. Perhaps mere finding would come within this custom.] It would, as the custom is averred: and so would a gift, by a party who had stolen the warrant, to an innocent party.

Fifthly, it is not alleged that in fact *Messrs. Ladbroke*

(*a*) 3 *New Ca.* 99.
(*b*) 1 *W. Bl.* 295 298.
(*c*) 4 *A. & E.* 870.
(*d*) 1 *C. M. & R.* 849.; *S. C.* 5 *Tyrwh.* 255.

& Company gave full value, but only that it was delivered to them "for certain valuable considerations;" nor that they held it bonâ fide, as the alleged custom requires. The averment as to the delivery to *Ladbroke & Company* would be satisfied if they had seen a thief steal the warrant and had purchased it of him for *5s.*

Sixthly, the conduct of *Wakefield* in transferring the warrant to *Ladbroke & Co.* for his own purposes is fraudulent: and the plaintiff is entitled to insist upon this as against the Bank.

Seventhly, it is not alleged that the transaction took place among bankers and merchants: and the custom is only laid as "the usage and custom of bankers and merchants."

Sir *F. Kelly*, Solicitor General, contrà. Even if the pleas did not shew payment, in the strict sense of the word, it would not follow that they failed to shew a defence. The action is not assumpsit for a breach of promise to pay, or for money had or received: it is shaped in case for a breach of duty; and the question is whether the pleas shew an excuse. The duty is that the cashier, the sole party constituted and empowered for that purpose by statute, should pay the dividends. Then the pleas shew that *Wakefield*, by the authority and as the agent of the plaintiff, and over whom the Bank has no controul, received the dividend warrant, which is the order by the Bank on the cashier to pay; that this warrant has never been produced to the cashier by the plaintiff or his agent; and that the agent has put it out of the power of the Bank to make the payment in the only way in which they were capable of paying. The Bank is merely the statutable servant of the public

for paying the dividend. The stock is created by stat. 5 *G.* 4. *c.* 11. By sect. 11 the Bank is required to have a cashier, who receives the money to pay the dividends for the Government, and who alone can pay. He is superintended by the accountant general, who is to inspect the vouchers; sect. 12; which vouchers, therefore, the cashier must produce in order to justify the disbursements. Such vouchers are recognized by statute: they are to express the exact sum payable, it being a transportable offence to give them for more or less; stat. 33 *G* 3. *c.* 30. *s.* 4., 11 *G.* 4. & 1 *W.* 4. *c.* 66. *s.* 9.; the receipts are exempted from stamp duty (*a*); it is forgery to counterfeit them; stat. 45 *G.* 3. *c.* 89. *s.* 2., stat. 11 *G.* 4. & 1 *W.* 4. *c.* 66. *s.* 3. That being the position of the Bank, can a party, after putting it out of the power of the Bank to perform the duty in the prescribed mode, complain of the breach of duty? [*Cresswell* J. We cannot take notice of the nature or form of a dividend warrant, unless some statute shews it: it is not on the record.] It is evidently a fallacy to treat this as question of debtor and creditor. [*Tindal* C. J. Your argument seems to come to this: that the duty is improperly alleged in the declaration.] Taking the declaration and plea together, no breach of duty is shewn. [*Maule* J. I do not see, by this record, that the plaintiff did not produce the warrant when payment was refused.] The declaration ought to shew that he did produce it. [*Maule* J. Suppose the Bank had offered him the money in the first instance, could he have refused that, and insisted on a dividend warrant?] The Bank gives, and the agent accepts, an instrument on which the Bank may be sued. The cases of insur-

(*a*) Stat. 55 *G.* 3. c. 184. Schedule, Part I. title, *Receipt.*

ance brokers, as *Scott* v. *Irving* (*a*), are distinguishable. Here the office of the cashier, and the practice of giving dividend warrants, are recognized by acts of Parliament: the plaintiff must be presumed to have given the power of attorney subject to the practice created by statute. The simple question is, whether the cashier would have been justified in paying without receiving a dividend warrant. [*Tindal* C. J. Perhaps you might neglect the allegation of custom, and rest upon this: that the attorney was to do all necessary; that he made the demand, and the Bank gave him the warrant in payment, on which he gave a receipt: then your case would be that this was a good plea of payment.] It may be treated as such, after verdict. What could the Bank have done if the plaintiff in person had chosen to receive the dividend warrant, and, instead of presenting it, had left the money in their hands. [*Maule* J. The grievance in the declaration is the refusal to pay at all.] There is no duty to pay absolutely on request: payment must be required according to the mode prescribed by statute: the declaration is bad, if the complaint be of a breach of duty otherwise understood. Then, further, here is at any rate a proper inception of payment. The authority might indeed be revoked, but only subject to what was properly done under it before the revocation. Indeed no distinct averment of revocation appears. But, assuming the revocation to have taken place after the acceptance of the warrant, prospectively, the case is as if the plaintiff had himself accepted the warrant. Could he afterwards demand the money without producing the warrant? It is argued that a power to receive payment does not au-

(*a*) 1 *B. & Ad.* 605.

thorise the receiving a bill of exchange. That analogy, however, applies only to a simple case of debtor and creditor. But the question in fact, and as raised by the declaration, turns on the duty of the Bank in its character of agent for the Government.

As to the custom: Mr. *Smith*'s inference from the authorities cited in his note on *Miller* v. *Race* (*a*), that no usage of trade can make an *English* instrument negotiable without words on the face of it extending its effect beyond one individual, cannot be supported. No doubt that is so as to bills of exchange in the first instance: but, after the drawer or payee has made his order, subsequent orders transfer the title from one indorsee to another without any thing more than the name of the indorser: Mr. *Smith*'s view accounts for the difficulty he feels in explaining *Renteria* v. *Ruding* (*b*), which is indeed irreconcileable with the principle he asserts. [*Cresswell* J. It may be said that the order of the drawer or payee who first indorses is, when the indorsement is in blank, an order to pay to the holder.] The dividend warrants may well acquire a negotiability by custom: that must have been the case with all negotiable instruments not made negotiable by statute: it is at first a question of evidence, but, after a time, one of law. The practice of the particular place and country makes the law in the case of the particular instrument, as explained (*c*) in Mr. *Smith*'s note to *Wigglesworth* v. *Dallison* (*d*). A strong instance of this is *Smith* v. *Wilson* (*e*), where it was held allowable to explain a written lease by oral evidence that a "thousand" rabbits,

(*a*) 1 *Smith's Lea. Ca.* 258, 260.
(*b*) *Moo. & M.* 511.
(*c*) 1 *Smith's Lea. Ca.* 299. 305.
(*d*) 1 *Doug.* 201.
(*e*) 3 *B. & Ad.* 728.

there spoken of, were, by the custom of the country where the lease was made, understood to mean twelve hundred. [*Cresswell* J. Such a contract, made in that country, would mean twelve hundred, wherever the contract was afterwards taken: but your plea, as framed, requires that there should be one meaning of the warrant in *London* and another elsewhere.]

It is contended that the custom, as laid, is bad for not making it a condition that the holder should have given value. But why should not a gift be enough, as it clearly is in the case of a bill of exchange or bank note? As to the suggestion that the bill might be stolen, the plea cannot negative all conceivable contingencies. [*Cresswell* J. You say your plea puts the instrument on the footing of a bill of exchange, made payable to order, and indorsed.] Even if the instrument were stolen, it would be enough, as in the case of a bill of exchange, if value had been given at any one step, and the holder were innocent. [*Cresswell* J. Can you dispense with bona fides too, as part of the description of the custom?] It is by no means clear that even that condition is essential. The custom as to bank notes might be described without it. All that is meant is that, primâ facie, delivery passes the right, no extrinsic objection being created.

It is said that the custom is not shewn to have been prevalent at the time of the transaction. That objection cannot be taken after verdict; perhaps it could not be taken on general demurrer. And the plea states the transfer to have been made "according to the said usage and custom." That shews, at any rate after verdict, that the parties were merchants and bankers, and that the transaction took place in *London*.

It is true, that it is not said, in express terms, that *Ladbroke & Company* were bonâ fide holders: but they are said to be "lawful bearers and holders:" that could not have been affirmed by the jury, except upon evidence that they were bonâ fide holders.

Crompton, in reply. It is now contended that the plea rests on the non-production of the dividend warrant. That non-production is not averred: if it had been, the plaintiff would have replied that the defendants had the dividend warrant themselves. The plea, in fact, relies on the title of *Ladbroke & Company*. The declaration would have been faulty if it had complained that the Bank gave no dividend warrant: the complaint is that, being bound to pay in some way, they have not paid in any way. The statutes respecting dividend warrants prove nothing; the warrants are merely cheques by one officer on another. Even if the warrant were lost, the Bank must still pay: there would be no difficulty in giving a satisfactory voucher: no particular voucher is required by statute. It is true that, where a negotiable instrument is lost, the remedy at law is suspended. But that brings the question to the point whether this warrant be a negotiable instrument. It is impossible to construe this as a plea of payment: the averment is, that the defendants still hold the money for *Ladbroke & Company*. No answer has been given to the argument that *Wakefield* had not power to take the warrant as payment: and, to the authorities before cited on this point, may be added, *Story, Commentaries on the Law of Agency*, s. 98. p. 76 (*London*, 1839). The revocation of the authority sufficiently appears by the allegation that the plaintiff himself demanded payment. The course of proceeding might be stopped at any time

before a title was vested elsewhere; *Story, Commentaries, &c., s.* 465. p. 423.; *s.* 476. p. 430. The question, therefore, is whether on this record there appear a good title elsewhere. The cases cited as to custom are inapplicable: the attempt here is to give to a written instrument a meaning inconsistent with its terms, which cannot be done; *Hutton* v. *Warren* (*a*). The words "according to the said usage and custom" are no more than *prætextu cujus:* they could not have been traversed: and they are consistent with a transfer at *York* by parties not merchants or bankers.

Cur. adv. vult.

TINDAL C. J., in this vacation (*June* 15th), delivered the judgment of the Court.

This is an action on the case by a person in whose name certain sums of stock were standing in the books of the Governor and Company of the Bank of *England*, for nonpayment of the dividends due upon that stock. The declaration, in the two first counts, sufficiently shews the right of the plaintiff to recover payment, and the duty of the defendants to pay the dividends on the two sums of stock to which those counts respectively relate, and their breach of that duty. The third count is in trover, for dividend warrants. The defendants pleaded: 1. Not Guilty to the whole declaration; 2., to the third count, that the plaintiff was not possessed of the warrants; and, 3. and 4., special pleas of justification to the first and second counts, not substantially differing, except in so far as they apply to the first and second counts of the declaration respectively. The plaintiff joined issue on the first and second

(*a*) 1 *M. & W.* 466.; *S. C. Tyrwh. & G.* 646.

pleas, and replied to the third and fourth, after admitting the letter of attorney to *Wakefield*, &c., that the defendants committed the grievances of their own wrong, absque residuo causæ: on which replications issues were joined. The jury found a verdict for the plaintiff on the plea of the general issue, and assessed damages on the first and second counts; and a verdict for the defendants on the plea of "Not possessed," and also a verdict for the defendants on the replications to the two special pleas (*a*). The case came before the Court of Queen's Bench upon a motion to determine whether, upon the facts proved at the trial, the verdict should be entered for the plaintiff or the defendants upon the third and fourth special pleas; when that Court directed such verdict to be entered for the defendants, and gave judgment for them.

The case now comes before us upon a claim by the plaintiff to have judgment entered for him *non obstante veredicto*: and the question raised by the writ of error is whether the third and fourth pleas give a sufficient answer to the declaration.

Each of those pleas, in effect, states that the plaintiff, before the dividends became due, by a certain deed poll, appointed one *Francis Wakefield* his attorney, to receive and give receipts for all dividends, due or to become due, for the plaintiff's stock, and to do all lawful acts for effecting the premises; that *Wakefield*, acting under the power of attorney, required the defendants to pay him the dividend; and that the defendants, at his request, delivered to him, and he accepted from the defendants, in payment of the dividend, a certain draft or order in writing of them the said defendants,

(*a*) See pp. 401, 408, antè.

addressed to their cashiers, commonly called a dividend warrant, whereby the cashiers were directed to pay to the plaintiff the dividend in question; and that the said *Wakefield* did then, by virtue of the power of attorney, give the defendants his receipt for the said dividend. The plea then states that, according to the usage and custom of bankers and merchants, used and approved in *London* for divers to wit sixty years now last past, all such dividend warrants are, by the said usage and custom, transferable and assignable by delivery only, and without indorsement, and that the bonâ fide holder of every such dividend warrant has been during all the time aforesaid, and still is, according to such usage and custom, entitled to receive payment on demand of the money expressed in the dividend warrant. The plea then alleges that *Wakefield* transferred the dividend warrant to *Messrs. Ladbroke & Company*, then carrying on the business of bankers in *London*, for valuable considerations then moving from *Messrs. Ladbroke & Company* to the said *Wakefield*, by means whereof, and according to the said usage and custom, *Messrs. Ladbroke & Company* became entitled to receive from the defendants the sum mentioned in the warrant; and that *Messrs. Ladbroke & Company*, whilst they were the lawful holders thereof, demanded payment of the money mentioned in the dividend warrant, and required the defendants to hold the same for their use and benefit: wherefore the defendants refused payment, as in the declaration mentioned.

The substance of the defence intended to be set up by these pleas is, that the defendants, having under the authority of the plaintiff delivered dividend warrants to

Wakefield, have become liable to pay the dividends to *Messrs. Ladbroke & Company*, and consequently are not bound to pay them to the plaintiff. And, if the pleas shewed that the defendants had incurred such a liability, they would amount to an answer to the counts of the declaration to which they were pleaded. But we are of opinion that the pleas do not shew any such liability. The main grounds, on which it was contended that the pleas were deficient, were, that the power of attorney, being to receive payment, did not authorise the attorney to receive payment otherwise than in money or in some usual manner: and, as the pleas do not shew that payment by dividend warrants was an usual manner of payment, and the statutes which recognise the making of dividend warrants do not shew that such payment is the only or the usual mode of paying dividends, or that it is an usual mode of making payments generally, it appears to us that the plea is deficient in this respect. But a more important and substantial objection to the pleas is, that they do not shew that the defendants have incurred any liability to pay *Messrs. Ladbroke & Company*, or any other person than the plaintiff. The instruments by which the alleged payments were made are described as drafts or orders, whereby the defendants' cashiers were directed to pay the money to the plaintiff. It is clear that such an instrument will not by the general law give any right of action to any person (other than the plaintiff) who might become possessed of it: and it was not contended, in the argument at the bar, that such right of action existed by the general law. But it was insisted that the usage and custom of merchants and bankers, stated in the pleas, gave such a right of action, and

imposed on the defendants the liability to pay the dividends to *Messrs. Ladbroke & Company.* But we are of opinion that the usage and custom stated has no such operation. It is not necessary to inquire what the effect of a general immemorial custom in a particular place might be, as this usage is not so pleaded, but is described as an usage and custom of bankers and merchants used and approved of for divers to wit sixty years, according to which dividend warrants pass by delivery without indorsement, and the bonâ fide holder thereof is entitled to receive the amount from the defendants; which is rather *a practice of trade* than *a custom* properly so called; and such a practice cannot alter the law, by which such an instrument does not confer any right of action on an assignee. See the case of *Glyn* v. *Baker* (*a*), and also Mr. *Smith's Leading Cases*, vol. i. p. 259., in which the law on this subject appears to us to be correctly stated.

It by no means follows from this opinion that mercantile usage, or the practice of particular trades or places, is inoperative. Such usage and practice may have, and often has, an important operation between parties who contract with the knowledge of its existence and with reference to it. See the case of *Stewart* v. *Aberdein* (*b*) and that of *Bartlett* v. *Pentland* (*c*): in the first of which a practice of brokers and underwriters to settle losses by set-off on account was held binding on a principal who knew of, and acquiesced in, the practice; and in the second of which a similar practice was held not to be binding on a principal who was not shewn to be cognisant of and to have assented to it.

(*a*) 13 *East*, 509.
(*b*) 4 *M. & W.* 211.
(*c*) 10 *B. & C.* 760.

As the pleas appear to us to be substantially defective in the essential particular of not shewing the defendants to have incurred any liability to *Messrs. Ladbroke & Company*, it is not of much importance to consider the minor objections that were taken on the argument. It seems, however, to us that, even supposing the usage stated to be binding, and to have the effect of making the defendants liable to pay assignees of dividend warrants who come within its terms, as pleaded, the pleas are defective in not shewing that the case in question comes within the usage. That usage is described as entitling the bonâ fide holder to payment: but *Messrs. Ladbroke & Company* are not averred to be bonâ fide holders. The transfer to them by *Wakefield* is indeed stated to be for valuable considerations moving from them to him; but a holder for valuable consideration is not necessarily a bonâ fide holder; and the statement, that the demand by *Messrs. Ladbroke & Company* was made whilst they were lawful holders, must be understood to mean that it was made whilst they were holders in the manner before described, and not to supply the want of averment of their being bonâ fide holders. It is, therefore quite consistent with the pleas that *Messrs. Ladbroke & Company* were not bonâ fide holders, and that the dividend warrants are not outstanding, but in the hands of the defendants themselves, who may consequently be in no danger of being called upon by any future holder, even if a bonâ fide holder could compel payment.

For these reasons, therefore, we are of opinion that the judgment given for the defendants below, so far as relates to the first and second counts, must be reversed, and judgment be given that the plaintiff recover the

damages found on those counts, *non obstante veredicto*, but that the said judgment, so far as relates to the last count of the declaration, must be affirmed.

Judgment reversed as to the issues on the second and third pleas: and affirmed as to the rest.

LEVY *against* WEBB.

Saturday, June 27th.

A declaration stated that "one *J. C. Pawle*" made a bill of exchange directed to defendant, and thereby required defendant to pay "to the order of the said *J. C. Pawle*" &c.; and defendant "accepted the said bill;" and "the said *J. C. Pawle*" indorsed it to plaintiff; and that defendant did not pay.

Held bad on special demurrer, inasmuch as, since stat. 3 & 4 *W.* 4. *c.* 42. *s.* 12., as well as before, the full names of the parties to a bill must be given; unless they are stated in the count to be described there as in the bill.

ASSUMPSIT. The declaration stated that, "whereas one *J. C. Pawle*, on" 23d *February* 1846, "made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *J. C. Pawle* 15*l.*, two months after date" &c., "and the defendant then accepted the said bill; and the said *J. C. Pawle* then indorsed the same to the plaintiff; and the defendant then promised the plaintiff to pay him the same bill, according to the tenor and effect thereof, and of the said acceptance and indorsement thereof:" breach, non-payment.

Demurrer, assigning for cause that the declaration contains many blanks and contractions in various parts thereof, in this, that it is stated in the said declaration that one *J. C. Pawle* made his bill &c., and thereby required defendant to pay to the order of the said *J. C. Pawle* the amount &c., and does not state the full Christian names of the drawer of the bill, but only designates them by initials or contractions: and also for that the Christian names of the said person should have been set out in full in the declaration, and not

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by contractions or initials only; or it should have been stated, in the declaration, that the drawer was designated by initial letters only in the bill: and also for that it is consistent with the declaration that the drawer may be described in the bill by his proper and full Christian names: and also for that it is not stated in the declaration that the Christian names of the drawer were unknown to the plaintiff: and also for that it should have been stated in the declaration that a certain person, designated in the said bill as *J. C. Pawle*, made his bill &c., and requested defendant to pay to the order of the said person so designated in the bill as *J. C. Pawle:* and also for that the declaration goes on to state that the said *J. C. Pawle* indorsed the said bill to plaintiff; whereas it should have stated that the said person so designated in the said bill as *J. C. Pawle* indorsed the same to plaintiff: And also for that it is a rule of law that no initials or contractions of any kind whatsoever should be used in pleadings.

Joinder in demurrer.

The demurrer was argued in this vacation (*a*).

Pearson, for the defendant. The necessity of accuracy as to Christian names appears from 6 *Bac. Abr.* 208 (7th ed.), *Pleas and Pleadings* (B) 3., and *Hutchinson* v. *Piper* (*b*). This case is within the authority of *Esdaile* v. *Maclean* (*c*), where it was held that the drawee of a bill ought not, in a declaration on the bill, to be described by merely the initial of his Christian name, unless he were shewn to be so described in the bill itself. In *Stephen on Pleading*, p. 338 (5th ed.), the general rule

(*a*) *June* 13th. Before Lord *Denman* C. J. and *Patteson* J.

(*b*) 4 *Taun.* 810.

(*c*) 15 *M. & W.* 277.

is laid down that "the pleadings must specify the names of persons;" and, at p. 339, he says: "the rule relates to persons *not* parties to the suit, of whom mention is made in the pleading." [*Patteson* J. referred to stat. 3 & 4 *W.* 4. *c.* 42. *s.* 12.] *Esdaile* v. *Maclean* (*a*) shews that this enactment protects only where the party is averred in the declaration to be described in the instrument in the particular form. *Appelmans* v. *Blanche* (*b*) is to the same effect. If the rule were not strictly observed, two judgments might be obtained on the same bill by describing the parties by initials in one declaration and by the full name in the other. "*J. C.*" cannot be a full Christian name, as it consists merely of consonants.

Archbold, contrà. The name might nevertheless be pronounced. In *Braithwaite* v. *Harrison* (*c*) the declaration stated that "one *J. Bankes* made his bill:" this was specially demurred to; but *Wightman* J. set aside the demurrer as frivolous, saying "the declaratiom must be taken to mean, that '*J. Bankes*' is so described in the bill." Here, as appears on the record, the defendant has accepted the bill: he cannot now object to the description: and, if the description in the bill be not "*J. C. Pawle*," there would be a variance; so that, on this record, it must be assumed that the description is such. In *Esdaile* v. *Maclean* (*a*) there was no decision on this point: the plaintiff had leave to amend by striking out the count in which the initial appeared, and had judgment on the other counts. In *Lindsay* v. *Wells* (*d*) the plaintiff was described in the declaration

(*a*) 15 *M. & W.* 277.
(*b*) 14 *M. & W.* 154.
(*c*) 1 *Dowl. & L.* 214.
(*d*) 3 *New Ca.* 277.

as "*Henry H. Lindsay;*" and the Court of Common Pleas refused to set aside the declaration as irregular. Stat. 3 & 4 *W.* 4. *c.* 42. *s.* 12. is quite general in its terms.

Pearson, in reply. The objection in *Lindsay* v. *Wells* (*a*) was not to the description of an instrument. The record here does not shew that the bill, as accepted by the defendant, contains the description objected to: there is therefore no estoppel. In *Ceal* v. *Cockburn* (*b*) a distringas was moved for on an affidavit describing the defendant as "*H. D. Cockburn;*" and, it not appearing that the action was brought on a bill of exchange in which the defendant was so described, the Court required the defect to be supplied.

Cur. adv. vult.

Lord DENMAN C. J., on this day, delivered judgment in the above case (*c*) and also on a similar point in the next case, *Gatty* v. *Field*, as after stated; p. 442.

(*a*) 3 *New. Ca.* 777. (*b*) 6 *M. & G.* 724.

(*c*) See also *Smith* v. *Ball*, antè, p. 361.

GATTY *against* FIELD and Others.

Saturday, June 27th.

DEBT for 24*l.* received by defendants to the use of plaintiff, and 24*l.* found due from them to plaintiff on an account stated.

Plea 3. (dated 5th *August*, 1845). That the account was stated of and concerning the sum of money and causes of action in the 1st count alleged, and not of or concerning any other matter, cause or thing whatsoever. And that heretofore, and before the having or receiving by defendants of the money in the 1st count mentioned, and before the said statement of the account, and the accruing of the causes of action, in the declaration mentioned, a certain race, to wit a horse-race, to wit called *The Derby Stakes*, in which divers, to wit 140, horses were proposed to run, was, about to wit the 29th *May*, 1845, to be run to wit, on a certain course called *Epsom Downs* in the county of *Surrey*: And that heretofore, and before the having or receiving &c., and before the said statement &c., and before the accruing &c., to wit on 23d *September*, 1844, a certain illegal game

Before the running of a horse-race, several persons, by agreement, subscribed into the hands of a secretary, and deposited with a treasurer, 15*s.* each; the names of the subscribers were then written respectively on cards; and the names of the horses intended to run were written in like manner on other cards; each set of cards was then placed in a box, and the cards drawn out alternately as chance directed: each subscriber was considered as holding that name of a horse which came out next before the drawing of his own name: and the holders became entitled to prizes, varying from 24*l.* downwards, as the horses whose names they held came in first, second, &c., in the race.

Held, in a case arising before stat. 8 & 9 *Vict. c.* 109., an illegal game. And *quære*, whether it would have been affected by sect. 18 of that act.

Per Lord *Denman* C. J. If it be pleaded, to an action for money had and received, that the money was staked on an illegal game, the plaintiff must shew in answer that he demanded back the stake before it was paid over; the mere bringing an action before payment over not being a sufficient demand.

It is ground of special demurrer, that the Christian names of persons are omitted, and initials, or "Mr.,' substituted, if such omission or substitution occurs, not in describing a written instrument, but in stating a transaction between the parties, on which the action turns. Held, therefore, that a plea setting forth the terms of the above illegal game was specially demurrable, because the treasurer and secretary were named, only, as "Mr. *Richards*" and "Mr. *Selway*."

called a lottery, not authorized by law or act of parliament, was, contrary to the form of the statute in such case made and provided and then in force, by certain persons, to wit the defendants, set up, kept open and exposed to be played and drawn at by lot at and in a certain public house and inn called &c., situate &c., under and subject to the following (amongst other) terms, rules and regulations, that is to say: That the adventurers or subscribers to the said game should consist of seventy members, each member to be entitled to two horses, and that each member should pay 1*s.* on entering his name, and 1*s.* on every succeeding meeting night of the club, until the whole subscription of 15*s.* should be paid, the last of which meeting nights for receiving subscriptions should be on *Monday*, 21st *January*, 1845, when all subscriptions were to be paid up: That "Mr. *Richards*," or the landlord for the time being of the said public house or inn, should be the treasurer, and "Mr. *Selway*" the secretary, who should receive the said subscriptions: That the whole amount of the said subscriptions should be paid into a savings' bank, as taken monthly, in the joint names of the treasurer, secretary and any two of the subscribers, as the said club might choose to appoint, and the interest money (if any) allowed to be added to the second and third prize, there to remain until the *Monday* next after the race, when the same should be taken out and paid over to the respective parties entitled to the same: That, before the running of the said race, the name of each of the horses entered for the running thereof should be put on a several and separate card, making together to wit the number aforesaid, and that all those cards should afterwards be placed in a box and mixed up together therein in one

general mass, and that the name of each one of the said several persons respectively, who had become adventurers in and subscribers to the same, should be put on a several and separate card, making together the number aforesaid; and that all those cards should also, before the running of the said race, be placed in another box, and be mixed up therein in one general mass, and that, before the running of the said race, two disinterested persons should draw the said cards out of the said boxes in the following manner, (that is to say) that one of those said two persons should, openly and as chance should direct, first draw out of the said box containing the cards with the names of the said horses so put thereon one of those cards, and that the said other of the said two disinterested persons should, openly and as chance should direct, then draw out of the said other box containing the cards with the names of the said adventurers and subscribers put thereon one of those cards; and that the said two disinterested persons should continue drawing in that manner alternately, openly, and as chance should direct, out of the said boxes, the whole of the said cards: and that the said person whose name was on the card, drawn out of the said box containing the cards with the names of the said adventurers and subscribers, immediately succeeding the drawing of the said card, out of the said box containing the cards with the names of the said horses so put thereon as aforesaid, on which card was put the name of the said horse that on the running of the said race should be placed as the winner thereof by the person who should be the judge of the said race, should be entitled to receive from, and be paid out of, the said subscriptions the sum of 24*l.* That, in the like manner,

the holder of the card containing the name of the horse who should be placed as aforesaid as second in the said race should be entitled to receive in like manner the sum of 9*l.*; and that, in like manner, &c. (the holder of the card containing the name of the horse placed third, to be entitled to 4*l.*). And that the holders of cards containing the names of the said horses which should start in the said race, except the first, second and third, should be entitled as aforesaid to the sum of 10*l.*: contrary to the form of the statute in such case made and provided.

Averment that, the said illegal game having been so set up, kept open, &c. in manner aforesaid, the plaintiff, the defendants, and divers, to wit sixty, other persons, afterwards, to wit on &c. and on divers other days and times afterwards and before the drawing of the said game as hereinafter mentioned, according to the said terms, rules and regulations, became and were respectively adventurers in and subscribers to the said game to the amount of the said sum of 15*s.* each; and they then, as such adventurers and subscribers, contributed and paid the said sum each; and the amount of the said sums, so contributed and paid by them as aforesaid, came altogether to a large sum, to wit 48*l.* 15*s.*; and the same were on the said days and times paid to and received by the said "Mr. *Selway*," so being secretary as aforesaid, and the said defendants, which is the acknowledged receipt of the said sums of money in the said first count mentioned. And that, after the setting up of the said illegal game, and before the said drawing, to wit on &c., (the plea then stated an agreement, between plaintiff, defendants and the other adventurers, that the terms and rules should be varied by reducing the number of

the adventurers to sixty five; and that the drawing for the race should be postponed till 10th *March*, 1845).

The plea then stated that, afterwards, and before the running of the said race, to wit on &c., and in pursuance of the said terms, rules &c., and in furtherance of the said illegal game, the name of each one of the said horses entered for the running of the said race, and the names of each of the said adventurers or subscribers, were put, placed, mixed up together, and drawn, and two disinterested persons, whose names are to the defendants unknown, were duly appointed in all respects according to the terms &c. aforesaid: And that, upon that occasion, one of the said two disinterested persons drew, openly and as chance directed, and out of the said box containing the said cards with the names of the said horses thereon, according to the said terms, &c., a card with the name of a horse thereon, to wit a horse called *Merry Monarch*, which had been and was proposed and entered to, and did, run the said race; and then, immediately succeeding the said drawing, the said disinterested persons drew out of the said other box containing the cards with the names of the plaintiff and the said other adventurers &c., according to the said terms, &c., a card with the name of the plaintiff thereon: contrary to the form of the statute in such case &c. And that, afterwards, and before the commencement of this suit, to wit on the said 29th *May*, 1845, the aforesaid race was run, and the said horse called *Merry Monarch*, whose name was put on the said card so drawn as aforesaid, was, in the running of the said race, placed by a certain person, "to wit one Mr. *Clark*," then being the judge in that behalf of the said race duly appointed, as the winner thereof: whereby the plaintiff,

according to the said terms and regulations of the said illegal game, became and was entitled to receive from and out of the said subscriptions the said sum of 24*l.*: Which is the said sum of money in the said first count mentioned, and not other or different, and which said sum consists exclusively of portions, and is parcel, of the said subscriptions so paid and received as aforesaid. Verification.

Demurrer, assigning for causes: That the said last plea does not set forth or show any illegal game or lottery; and the supposed game and supposed lottery in the said last plea mentioned is legal and not contrary to any statute: And also for that the said last plea, although pleaded to the whole declaration, does not confess that the defendants were indebted to the plaintiff in 24*l.* for money found to be due upon an account stated, but argumentatively denies the same; and the said last plea gives the plaintiff no colour to maintain his action upon the said account stated, and, as to that count, amounts to the General issue: And also for that the said last plea is uncertain in that it does not set out the Christian or first names of the said Mr. *Selway*, or Mr. *Richards* or Mr. *Clark*, or aver that such Christian or first names were or are unknown to the defendants; and is further uncertain in not stating the names of the adventurers therein mentioned, or of the two disinterested persons therein mentioned; and, although it is stated that the names of the said two disinterested persons are unknown to the defendants, it does not appear that their names are unknown to each of the defendants, and it is consistent with the averments in the said plea that the names of the said two disinterested persons are known to one of the defendants: And also for that it appears

by the said last plea that the defendants did receive to plaintiff's use the sum of 15*s.* contributed and paid by him as in the said plea admitted, and that they are liable to repay the same to the plaintiff; and the said plea, being bad in part, is bad altogether. Joinder.

The demurrer was argued last *Easter* term (*a*).

Pearson for the plaintiff. It cannot be contended, after the decision in *Allport* v. *Nutt* (*b*), that the species of lottery described in the plea is legal (*c*). But the declaration here is unanswered as to 15*s.* of the amount claimed. That sum, being the deposit made by the plaintiff as a contributor to the lottery, is not alleged to have been paid over; and he is therefore entitled to recover it; *Hastelow* v. *Jackson* (*d*), *Hodson* v. *Terrill* (*e*). The action, here, is notice to the defendants not to pay over the deposit; and, after notice, that payment would be wrongful. The plea (which was held good) in *Allport* v. *Nutt* (*b*) excluded the deposit money from the sum claimed. Further, the plea either amounts to a general issue pleaded to the account stated, or is bad for duplicity, being an attempted answer both as to the 24*l.* claimed in the first count and the 24*l.* claimed in the second count. It is true that the plea professes to identify the "sum of money and causes of action" in the first

(*a*) *May* 1st. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Wightman* Js.

(*b*) 1 *Com. B.* 974. See *Jones* v. *Carter*, 8 *Q. B.* 134.

(*c*) *Pearson*, however, suggested that that decision was previous to stat. 8 & 9 *Vict. c.* 109. *s.* 18.; but *Hugh Hill*, contrà, (denying that the clause applied to this kind of transaction) observed that the present plea was pleaded before 8th *August*, 1845, when the act received the royal assent.

(*d*) 8 *B.* & *C.* 221. See *Mearing* v. *Hellings*, 14 *M.* & *W.* 711.

(*e*) 1 *Cr.* & *M.* 797.; *S. C.* 3 *Tyrwh.* 929.

count with those in the second; and a similar form was sanctioned by the Court in *Mee* v. *Tomlinson* (*a*). But the plea there differed in some degree from this, averring that the sums mentioned in the respective counts were "one and the same debt." [*Wightman* J. No other construction can be put upon the words here, "the sum of money and causes of action in the first count alleged."] *Mee* v. *Tomlinson* (*a*) has, on one point at least, been over-ruled (*b*). The objection of duplicity here is supported by *Rawlinson* v. *Shand* (*c*), and is suggested and enforced in a note, by the reporters, to *Foot* v. *Baker* (*d*). The illegality might have been pleaded to the first count, and Nunquam indebitatus to the second. *Eicke* v. *Nokes* (*e*) shews that this course would have been effectual, as to the account stated. If it had appeared in evidence that there was but a single cause of action, the Court would have taken notice that the supposed accounting could have had reference only to the matters in the first count, and therefore that, on the account stated, no claim could arise. *Early* v. *Bowman* (*g*) (on the effect of payment into Court on the account stated) is an analogous case. It was, indeed, said, in *Arthur* v. *Dartch* (*h*), with reference to proceedings at nisi prius, that "primâ facie, where there is proof of an account stated, the plaintiff is entitled to recover; and if any items of the account are impeachable," "it is for the defendant to shew that." But this dictum, if it bears on the present question, is not reconcileable with the rule apparently laid down by other cases.

(*a*) 4 *A.* & *E.* 262.
(*b*) See *Bright* v. *Beard*, 4 *Q. B.* 832. 836, 837.
(*c*) 5 *M.* & *W.* 468.
(*d*) 5 *Man.* & *G.* 335, note (*b*).
(*e*) 1 *M.* & *Rob.* 359.
(*g*) 1 *B.* & *Ad.* 889.
(*h*) 9 *Jurist*, 118., Exch. *Hil. T.* 1845.

Further, it is a fatal defect, on special demurrer, that the treasurer, the secretary and the judge of the race are not described by their Christian names, but only as Mr. *Richards*, Mr. *Selway* and Mr. *Clark*; nor is the want of Christian names excused by any averment. *Applemans* v. *Blanche* (*a*) and *Esdaile* v. *Maclean* (*b*) are in point. [Lord *Denman* C. J. In *Appelmans* v. *Blanche* (*a*) there was a blank before the name: if there is anything that you can make a sound of, the case may be different.] The averment, in excuse for not naming the two disinterested persons, that their "names are to the defendants unknown," does not expressly shew that both names are unknown to both defendants.

Hugh Hill contrà. As to the illegality, *Allport* v. *Nutt* (*c*) is decisive. As to the 15*s.* deposit: the plea is pleaded as to a claim of the whole 24*l.* stake; and correctly, on that supposition. If the plaintiff meant to allege that he proceeded only for his deposit, he ought to have shewn that he claimed that only, and that he had demanded it back before any payment over, as was proved to have been done in *Hastelow* v. *Jackson* (*d*) and *Hodson* v. *Terrill* (*e*). According to his view of the case, he should have new assigned. By demurring, he admits that he is proceeding for the whole stake. The objection of uncertainty or duplicity, founded on the commencement of the plea, might have been taken, if valid, in *Allport* v. *Nutt* (*c*), but was not.

(*a*) 14 *M.* & *W.* 154.
(*b*) 15 *M.* & *W.* 277.
(*c*) 1 *Com. B.* 974.
(*d*) 8 *B.* & *C.* 221.
(*e*) 1 *Cro.* & *M.* 797.; *S. C.* 3 *Tyrwh.* 929.

Rawlinson v. *Shand* (*a*) decides nothing applicable to the present plea. In *Eicke* v. *Nokes* (*b*) the action must have been brought before the New Rules, which require that the nondelivery of an attorney's bill should be specially pleaded (*c*): in a case governed by those Rules no inference can be drawn from it. As to the names; it is sufficient to answer that the word "Mr." might possibly be a Christian name: the Court will not judicially affirm the contrary. In *Scott* v. *Soans* (*d*) the Court would not intend that "*Jonathan otherwise John*" was not all one Christian name. And in *Walker* v. *Parkins* (*e*), where a writ of summons "at the suit of *Henry Walker & Co.*" was indorsed "the *plaintiff* claims," *Coleridge* J., in the Bail Court, held that *Walker & Co.* did not necessarily mean several persons, and might even be the name of one; and he rescinded an order for setting the writ of summons aside.

Pearson, in reply. If the deposit was a debt, there was no need of any other demand than the bringing of the action. [Lord *Denman* C. J. If you do not demand back the deposit, you permit the stakeholder to dispose of it. Both parties were engaged in an illegal transaction; and the plaintiff should have done some act to put an end to it.] No pleading in the nature of a new assignment was necessary. The plea itself shews that the plaintiff had deposited 15*s.*, which he is entitled to recover as had and received to his use. As to the Christian names, the case must be tried by common sense; and it is impossible to suppose that the two letters "Mr.", which cannot be pronounced as

(*a*) 5 *M. & W.* 468.
(*b*) 1 *M. & Rob.* 359.
(*c*) *Lane* v. *Glenny*, 7 *A. & E.* 83.
(*d*) 3 *East*, 111.
(*e*) 2 *Dowl. & L.* 982.

a word, are a Christian name. [Lord *Denman* C. J. Is there any authority for saying, generally, that, when third persons are named in pleading, it is necessary to ascertain their Christian names?] The name "*W. Watson*" in *Esdaile* v. *Maclean* (*a*) was that of a third person. Stat. 3 & 4 *W.* 4. *c.* 42. *s.* 12. enacts that, "in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or letters or contraction" &c., "instead of stating the Christian or first name or names in full." Even in that specified case, it must appear that the name, whosesoever it be, is designated by a contraction or initial on the instrument itself. [Lord *Denman* C. J. The cases which have been mentioned seem to shew that it is not enough to do what the act points out.] The liberty there given is conditional. If the condition be not pursued, the general rule must apply, that "Regularly by the common law every natural man, having no name of dignity, ought to be named in all originals, and other suits by his Christian name and surname;" 2 *Inst.* 665. *Tomlin* v. *Preston* (*b*) and —— v. *Snow* (*c*) likewise shew the degree of strictness required in stating first names.

Lord DENMAN C. J. It would appear that the statute, in order to remove possible objections, has created

(*a*) 15 *M.* & *W.* 277. (*b*) 1 *Chitt. Rep.* 397.

(*c*) 1 *Chitt. Rep.* 398. note (*a*). The objection there was, that the defendant was named in process as "Mr. *Snow*."

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a necessity for a great deal of averment otherwise superfluous. If the argument is correct, the enactment seems rather to aggravate inconvenience. I am not satisfied that there is authority for saying that to describe parties by the name under which they have chosen to describe themselves is not sufficient as between them. But we will refer to the Court of Exchequer on this point. On the general question of illegality, we are bound by the decision in *Allport* v. *Nutt* (*a*).

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

On the point as to names,

Cur. adv. vult.

LEVY v. WEBB, GATTY v. FIELD.

Lord DENMAN C. J. now delivered the judgment of the Court in *Levy* v. *Webb* (*b*) and the above case.

The question reserved for consideration in the first of these cases turned upon the insertion of initials only, instead of the full Christian names; in the second, on the omission of Christian names and substitution of "Mr." And we are of opinion that, when such omission or substitution is made, not in the description of some written instrument, but in the statement of a transaction between the parties, on which the action turns, it is good ground of special demurrer. We must presume that every person has a Christian name; and it ought to be stated, or reason assigned for the omission. The plaintiff therefore is entitled to judgment: but we think the defendants should have leave to amend.

Leave to amend granted.

(*a*) 1 *Com. B.* 974.

(*b*) Antè, p. 427.

In the Matter of an Act &c. (7 & 8 VICTORIA, c. ciii., local and personal, Public),

Between

JUBB and the Dock Company at KINGSTON upon HULL.

The *Hull* Dock Company's act (7 & 8 *Vict.* c. ciii.), giving them power to take certain lands, provided for the payment of purchase-money, and enabled the owners of lands, or interests therein, to accept compensation for

A RULE nisi was obtained in last *Easter* term for a certiorari to the clerk of the peace for the county of the town of *Kingston upon Hull* to bring into this Court the verdict and judgment after mentioned, for the purpose of their being quashed. The following facts appeared by affidavits for and against the rule.

The Dock Company, under the authority of the above mentioned act (*a*), gave notice to *William Jubb*

any damage by them sustained by reason of the severing of such lands, or otherwise owing to the exercise of the powers of that act. Similar language as to compensation was used in other clauses. In default of agreement between the company and land-owners, the purchase-money and compensation were to be assessed by a jury, who, by sect. 117, were to deliver their verdict for the sum to be paid for purchase, and also the sum to be paid for the injury done to the lands of any such party by the severance of such lands from those required by the company; *and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works*, whether for damage sustained before the time of the inquiry, or for future damage, either temporary or permanent, or for any recurring damage &c.; and *the sums to be paid* for the injury done by any such severance as aforesaid, *or by way of compensation for any such damage as aforesaid*, were in every case to be assessed separately from the value of the lands &c., or the sum to be paid for the purchase thereof &c.

Held, that the words of sect. 117 were large enough to include compensation to a land-owner, parting with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on. And that a verdict awarding, first, a sum for purchase-money, and, secondly, a further sum as compensation for such loss, was warranted by the act.

Semble, that, if the latter part of the finding had been void for want of jurisdiction, the inquisition might have been removed by certiorari, though the act contained a clause taking away certiorari, and the verdict, as to the award of purchase-money, was good.

(*a*) Stat. 7 & 8 *Vict.* c. ciii., local and personal, public, "for making new docks, and other works connected therewith, in addition to the present docks at *Kingston-upon-Hull*; and for amending the acts relating to such last mentioned docks" enacts as follows.

that they required to purchase and take, for the purposes of the act, a brewhouse, yard and premises, of which he claimed to be the owner, and which the act

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Sect. 83 enacts: That the owners of such lands or of such estate or interest therein as are beforementioned, and all parties by the act enabled to convey &c., "may agree to accept, and" (subject to certain restrictions) "may accept, satisfaction for the value of such lands or any interest therein to which such party shall be entitled; and in addition to compensation for the value of such lands, or of the interest therein, to be so conveyed, such parties shall be entitled to, and may in like manner accept compensation for any damage by them sustained, by reason of the severing or dividing of such lands or otherwise, owing to the exercise of the powers of this act."

Sect. 100. "That the company shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased, or permanently used for the purposes of this act, until they shall either have paid to every party having any interest in such lands, or deposited in the Bank of *England*" &c., "the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein." Proviso that the company may enter without consent to survey and take levels, "making compensation for any damage thereby occasioned to the owners or occupiers of such lands."

Sect. 103. "That when the company shall require to purchase any of the lands which by this act they are authorized to purchase or take they shall give notice thereof to all the parties interested in such lands, or enabled by this act to sell, and convey, or release the same, or such of them as shall be known to the company, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall be in writing, and shall state the particulars of the lands so required, and shall state that the company are willing to treat for the purchase of the interest of such party in such lands, and as to the compensation to be made for the damage that may be sustained by him by reason of the making of the said docks and works hereby authorized."

Sect. 104 enacts: That, if, for one month after notice, "any such party shall fail to state the particulars of his claim in respect of any such lands, or to treat with the company in respect of his interest therein, or if such party and the company shall differ as to the amount of the compensation to be paid to such party for any such interest, or for any damage that may be sustained by him by reason of the execution of the works hereby authorized, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation."

authorized them to take, and that they were willing to treat for the purchase of his interest, and as to the compensation to be made for the damages that might

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Sect. 106. "And for the purpose of making provision for settling cases of disputed compensation arising under this act, be it enacted, That if any difference shall arise, or if no agreement can be come to between the company and the owners of any lands, or of any interest in any such lands taken or required for, or injuriously affected by, the execution of the works hereby authorized (including among such owners all parties by this act enabled to sell or convey lands), as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof," or if by reason of absence such owner be prevented from treating, or if such owner fail to disclose or prove his title, or by reason of any impediment or disability be incapable of making any agreement, conveyance, or release, necessary for enabling the company to take such lands or proceed in making the works &c., "or if any such difference arise as to the amount of the damages occasioned to any lands by the temporary occupation thereof in the making of the said works, or otherwise in exercise of the powers given by this act, and for which any party may be entitled to demand compensation according to the provisions of this act, the amount of the compensation to be paid by the company in every such case shall be settled by the verdict of a jury in manner hereinafter mentioned."

By sect. 107, if the compensation claimed in any of the cases within s. 106 shall not exceed 50*l.*, it shall be settled by two justices.

Sect. 108. enacts: That, where the determination of a jury shall be necessary by reason of any such difference, the company, one month at least before issuing their warrant for summoning a jury as after provided, "shall give notice in writing to the party with whom such difference shall have arisen, of their intention to cause such jury to be summoned, and in such notice the company shall state what sum of money they are willing to give such party for his interest in such lands, and for the damage to be sustained by him by the execution of the works hereby authorized."

Sects. 109 to 116 prescribe the course for summoning a compensation jury by the company's warrant directed to the sheriff (or, if he is interested, to the coroner), and regulate the proceedings on the inquiry.

Sect. 117 enacts: "That such jury shall deliver their verdict for the sum of money to be paid for the purchase of the lands required for the works hereby authorized, or of any interest therein belonging to the party with whom such question of disputed compensation shall so have arisen, and also the sum of money to be paid for the injury done to the lands of

be sustained, if any, by reason of the making of the Company's docks and works. *Jubb* did not state his claim, or proceed to treat, within the time limited by

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any such party by the severance of such lands from the lands required by the company; and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether it be for damage sustained before the time of the inquiry, or for future damage, either temporary or permanent, or for any recurring damage of which the cause is then only in part obviated, and which cannot or will not be further obviated by the company, and the sums of money to be paid for the injury done by any such severance as aforesaid, or by way of compensation for any such damage as aforesaid, shall in every case be assessed separately from the value of the lands or the sum to be paid for the purchase thereof or of any interest therein."

Sect. 120 enacts: "That on every such inquiry before a jury, where the verdict of the jury shall be given for the same, or a greater sum than the sum previously offered by the company, all the costs of such inquiry shall be borne by the company; but if the verdict of the jury be given for a less sum than the sum previously offered by the company, one half of the costs shall be defrayed by the owner of the lands, and the other half by the company." And by sect. 121, such costs are to be settled by the sheriff; and, with respect to those payable by the company, if such costs are not paid within seven days after demand, "the same shall be recoverable by distress, and on application to any justice he shall give his warrant accordingly."

Sect. 156. "And with respect to any lands which shall be in the possession of any person having no greater interest therein than as tenant at will or lessee for a year, or from year to year; be it enacted, That at the expiration of six months after receiving notice to that effect from the company." &c., "all such persons shall respectively deliver up to the company" "any such lands in their possession required for the purposes of this act;" &c.

Sect. 157. "Provided always, and be it enacted, That if any such person as last aforesaid be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required compensation for the damage done to him in his tenancy by the severance of the lands required from those not required, and the amount of such compensation shall be determined by two justices, in case the parties differ about the same."

Sects. 279 to 287 provide for the enforcement of penalties and for-

the statute: and the Company thereupon gave him notice that they were willing to give him for his interest in the said brewhouse and yard, and for the damage to be sustained by him in the execution of the works &c., 460*l.*: which if he declined accepting, they would summon a jury as after mentioned; and they did accordingly issue their warrant requiring the coroner of the county of the town of *Kingston upon Hull* (the sheriff being a party interested) to summon a jury to assess the sum of money to be paid by the Company to *Jubb* "for the purchase of the interest of the said *W. Jubb* in the brewhouse," &c., "and also the sum of money to be paid to the said *W. Jubb* for any damage by him sustained by the execution of the works" in the warrant mentioned. The inquiry took place, the Company and *Jubb* attending by counsel; and *Jubb*, in addition to evidence which he offered as to the value of the land and buildings, called witnesses in support of a claim on his part for compensation in respect of the damage he would sustain by having to give up his business as a brewer till he could obtain suitable premises for carrying it on. The Company objected to this evidence, alleging that the claim was not provided for by the statute, and therefore the jury could not award compensation upon it; but the coroner over-ruled the objection; and the jury found a verdict which, as stated on the record of the inquisition, was as follows.

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feitures, and application of the proceeds: and sect. 288 gives a form of summary conviction.

Sect. 289. "And be it enacted, That no proceeding in pursuance of this act, or the said recited acts, or either of them, shall be quashed or vacated for want of form, nor shall the same be removed by certiorari, or otherwise, into any of the superior Courts."

Sect. 304. See pp. 453, 4, post.

"And the said jurors" &c. "now here assess and determine upon their oath the compensation to be paid by the said Company to the said *W. Jubb* as follows, viz.: The sum of 400*l.* for the purchase of the interest of him the said *W. Jubb* in the brewhouse, yard and premises aforesaid, with the appurtenances, and all the bricks and buildings connected therewith: and the further sum of 300*l.* as compensation for the damage, loss and injury which the said *W. Jubb* will sustain by reason of his having to give up his business as a brewer until he can obtain suitable premises in which to carry on his said business of brewer."

And the coroner, as appeared by the same record, gave judgment that *Jubb* should recover against the Company the said sum of 400*l.* by the jurors assessed as compensation for the purchase &c., and the said further sum of 300*l.* as compensation for the damage &c. (in the words of the finding).

In last term (*a*),

Watson and *J. Henderson* shewed cause. First, the writ of certiorari is taken away by sect. 289 of stat. 7 & 8 *Vict. c.* ciii. It is true that, if proceedings under colour of a statute have been so erroneous that a total want of jurisdiction appears, a certiorari lies, though taken away by the statute; *Rex* v. *The Justices of Somersetshire* (*b*). But, when the proceedings are founded on jurisdiction, though there has been irregularity or excess, the writ, if prohibited by statute, cannot go. *Regina* v. *The Sheffield Railway Company* (*c*) supports this distinction. Here the judgment, so far as it awards

(*a*) The case was argued on *June* 4th and 9th; before Lord *Denman* C. J., *Patteson* and *Williams* Js.

(*b*) 5 *B.* & *C.* 816.

(*c*) 11 *A.* & *E.* 194.

only a sum for purchase money, is undeniably good; and, assuming the rest to be unwarranted, an inquisition taken under the authority of the statute is not therefore removeable. [Lord *Denman* C. J. Do you contend that, by adding something over which there was jurisdiction, the authority of the Court to remove was taken away?] *Rex* v. *The Justices of the West Riding* (*a*) shews that certiorari does not lie in such a case. [Lord *Denman* C. J. We thought there that the application was a mode of moving for a new trial, which we ought not to encourage. But there have been other cases in which the Court has held that certiorari lay, when the proceeding operated in part upon something not within the jurisdiction. In *Rex* v. *The Justices of Kent* (*b*), where justices had made a single order for diverting a highway and for stopping up the old road and appropriating the soil, the Court granted a certiorari.] There the justices had done what was wholly beyond their power; here the coroner had authority to take the inquisition, though it is contended that, under one head of claim, damages were improperly given. [Lord *Denman* C. J. In *Rex* v. *The Justices of Kent* (*b*) there was power to make the new road.] The inquisition here separates the amounts given for purchase and for compensation: the Company may tender the purchase money only; and, if possession is refused, the right may be tried by action of ejectment more conveniently than by motion (*c*). But, secondly,

(*a*) 1 *A. & E.* 563.

(*b*) 10 *B. & C.* 477. And see *Rex* v. *The Justices of Middlesex*, 5 *A. & E.* 626.

(*c*) Sect. 95 of stat. 7 & 8 *Vict. c.* ciii., on refusal of a land-owner to accept purchase or compensation money awarded or agreed upon, enables the company to deposit the sum in the Bank of *England* to his credit, and thereupon vests the land in the company.

the award of compensation for damage is correct. The intention of the legislature clearly was that the party giving up his property should be placed (so far as money could do it) in the same situation as before. Justice would not be done if the party resigning a business which is valuable to him and might render the property valuable to a purchaser should receive only the bare worth of the land. This additional value may indeed be properly considered an element in the price of the estate purchased. Sect. 117 of stat. 7 & 8 *Vict. c.* ciii. enacts that the jury summoned on the inquiry shall by their verdict award the sum "to be paid for purchase of the lands required" &c., "or of any interest therein belonging to the party" who claims compensation, and also the sum of money "to be paid for the injury done to the lands of any such party by the severance of such lands from the lands required by the Company"; and also the sum "to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works," whether damage sustained before the time of the inquiry, or future damage, temporary or permanent, or recurring damage, &c. And the intention here shewn to indemnify owners for every species of injury appears also in the language of sects. 83, 100, 103, 104, 106, 108. If compensation for the loss now in question could not be awarded to a principal owner, he would be less protected than tenants at will are under sects. 156, 157. Should the Court think the question doubtful, it is a circumstance which ought to have some weight, that the Company, who raise the objection, are the parties who set in motion the inquiry; *Regina* v. *The Trustees of Swansea Harbour* (*a*).

(*a*) 8 *A. & E.* 439.

Sir *F. Kelly*, Solicitor General, *Martin* and *Archbold*, contrà. First, the certiorari is not taken away. Sect. 289 has been relied upon: but it is doubtful whether it applies to proceedings of this kind. It follows a series of sections, beginning with sect. 279, which relate to penalties and forfeitures, and end with a form of summary conviction; and it probably relates to such proceedings only. Even if the meaning be more extensive, a clause taking away certiorari applies only where the parties exercising power act within their jurisdiction: so that the question still remains, whether any matter be disposed of by this verdict which is distinctly out of the jurisdiction of the coroner and jury. It is true that in *Regina* v. *The Justices of the West Riding* (*a*) this Court refused a mandamus directing the justices to amend a judgment which, it was contended, was erroneous in adding to damages which were properly awarded damages in respect of a subject not within the jurisdiction of the jury. The statutes there in words took away the remedy by certiorari, as here. But there, if the award of the excess had been a nullity, the applicants might have tendered the damages legally awarded, and have taken legal measures to obtain possession, if withheld. A mandamus therefore was not needed to correct the error. The application here is for a certiorari to quash a proceeding which is alleged to be erroneous; and justice cannot be done if the verdict stand. Sect. 120 gives costs against the Company if the sum awarded be the same as, or less than, the sum offered by them: now, if the disputed item be taken into account, the sum awarded exceeds the offer; if it be not, the sum

(*a*) 1 *A. & E.* 563.

awarded falls short of the offer. If the land-owner here applies to a justice, a distress warrant will issue, under sect. 121; for it is not to be expected that the justice will enter into an examination of the clauses of the statute in order to ascertain whether the verdict can be supported. [*Patteson* J. Could not you replevy, or bring an action?] Sects. 120, 121, seem not to warrant that. The costs are to be paid by the Company "where the verdict of the jury shall be given," not "*duly* given," for a sum as large as that offered. The certiorari is, at any rate, a more direct and effectual remedy. In *Regina* v. *The Sheffield Railway Company* (*a*), though the Court refused the certiorari, Lord *Denman* C. J. wholly repudiated the doctrine that the statutory clause taking away certiorari in express terms applied to a case of excess of jurisdiction. And this agrees with *Rex* v. *The Justices of Somersetshire* (*b*). Clearly a certiorari would lie, if the jury had assessed damages for an assault, or criminal conversation. That the objection is only to part of the verdict furnishes an argument in favour of the certiorari; for, if it extended to the whole, the proceeding might be treated as a nullity altogether. *Ex parte Carruthers* (*c*) shews that the verdict may be quashed as to part. That the judgment and verdict are not made good by the circumstance that they are good for a part, appears from *Rex* v. *The Justices of Kent* (*d*).

Next, the damages for the injury to the trade are not warranted by the statute. The question must be determined by sect. 117. Sect. 83 gives compensation only for the value of the land and the interest therein, not

(*a*) 11 *A. & E.* 194. 199.
(*b*) 5 *B. & C.* 806.
(*c*) 2 *Man. & R.* 397.
(*d*) 10 *B. & C.* 477.

defining what is the nature of the "interest;" and for damage sustained by severing or dividing, "or otherwise." The damage here mentioned seems to be damage to the land itself; and at any rate the section relates only to voluntary contracts. Sect. 106 mentions only the value of lands and of the interest therein, and damages occasioned to the land by temporary occupation, or otherwise. And it refers to sect. 117, which contains three heads of compensation: money to be paid for purchase of the land or any interest therein, or for injury done to the lands by severance, or by way of compensation for damage (whether temporary, permanent, or recurring) occasioned to the lands by execution of the works. And it cannot be said that an interpretation adverse to the Company is to be put upon this section on the ground of its containing terms procured by themselves: the clause is the one usually inserted in bills of this sort under the superintendence of the Chairman of the Committees of the House of Lords. No presumption is made in favour of an inferior or limited jurisdiction; 6 *Bac. Abr.* 234 (ed. 7), tit. *Pleas and Pleading* (E) 1, *Regina* v. *Spackman* (*a*), *Trevor* v. *Wall* (*b*). It is quite clear that, if compensation for loss of trade had been intended, there would have been express words to that effect: especially as, in sect. 157, the case of lessees for no greater a term than from year to year is provided for, and they are to have compensation as from an incoming tenant. [*Patteson* J. In the interpretation clause, sect. 304, it is said, that "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure, and also all

(*a*) 2 *Q. B.* 301.

(*b*) 1 *T. R.* 151.

easements, and all estates, profits, rights, and interests whatsoever, which can exist in or be enjoyed out of lands."] That must be construed as including "profits" &c. ejusdem generis with those mentioned before, such as easements. An attempt like this was made in *Rex* v. *The London Dock Company* (*a*): but the Court disallowed the claim.

Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*June* 27th), delivered the judgment of the Court.

This was an application for a writ of certiorari to remove into this Court, in order to quash it, a certain inquisition to award compensation to *William Jubb* for the loss of some premises taken from him by the *Hull* Dock Company for the construction of new works. The finding of the jury, so far as it is material to the present purpose, is as follows. (His Lordship then stated it, as in p. 448, antè). And the objection applies to the latter part of this finding, it being contended, on behalf of the Company, that the jury have exceeded the powers given to them by the *Hull* Dock Act, and that, by reason of that excess, the inquisition is wholly void. The question, therefore, turns upon the true construction of that act: and, although several clauses were referred to in the course of the argument, it was at length agreed that the 117th is the material section. That is in these terms. (His Lordship here read the whole clause, for which, see p. 445, note (*a*), antè.)

And the question is (as it was throughout the argument properly assumed to be), whether it was competent for the jury, under this clause, to award the latter

(*a*) 5 *A. & E.* 163.

sum of 300*l.* for the kind of injury alleged to have been sustained: because, in this stage of the proceedings, it must be assumed that there was sufficient proof of such injury, and it is certain that damage to the amount awarded may have been sustained by the interruption or breaking up of such a trade, and that therefore it must be considered a priori a reasonable subject for compensation.

The difficulty in this case arises from the language of the latter branch of the clause under which alone this species of compensation can be given, the former part expressly relating to the purchase of land (meaning in this act any kind of property), and to "the sum of money to be paid for the injury done to the lands of any such party" (meaning of course the party interested) "by the severanee of such lands." Then follows the third branch of injury: "and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands;" not to the *owner of* or *party interested in* such lands, nor is such owner or party mentioned or designated, except by implication arising from the expression "sum of money to be paid," which can only mean to the owner or party interested. That such must have been the meaning, and that the words "owner or party interested" have been accidentally omitted, or are to be considered as understood, seems tolerably clear from this, that any injury to property as unconnected with an owner is unmeaning and absurd: and in this very act such is the form of expression generally used. In section 100, "making compensation for any damage thereby occasioned to the owners and occupiers of such lands" is the language. In section 103, "damage that may be

sustained by him" (the party interested) "by reason of the making of the said docks"; and again, in section 104, "compensation" "for any damage that may be sustained by *him* by reason of the execution of the works." To this may be added that, in section 106, wherein mention is first made of having recourse to a jury in the event of certain other modes of adjustment having failed, that jury is to assess "the amount of the compensation to be paid by the company;" and it is to be observed that "compensation" is mentioned without any limitation or restriction, and must be understood as meaning remuneration or satisfaction for injury or damage of every description. If then the words "damage occasioned to any such lands" may be considered as virtually incorporating "owner of" or "party interested in" any such lands, the rest, we think, is quite clear, because we have no doubt but that the expressions "damage" "before the time of the inquiry", and "future damage, either temporary or permanent", are large enough to sustain the finding of the jury as to the latter sum of 300*l.* And upon the whole, in a case where we see no reason to doubt but that substantial justice has been done, we are of opinion that, without any excessive and unauthorized violence of construction, we may read the latter part of the clause in question in the manner above suggested.

We do not think that the cases cited have any very material bearing upon the present. In *Rex* v. *The Justices of the West Riding* (*a*), in the matter of the *Aire* and *Calder* Navigation Company, which is perhaps the nearest, and in which the jury had found present damages nothing, future damages 2800*l.*, this Court re-

(*a*) 1 *A. & E.* 563.

fused a mandamus directing the sessions to enter a verdict in a particular manner, because they held that course to be getting rid by a side wind of clauses in an act of parliament by which a certiorari was expressly taken away. There was no decision upon the finding of the jury. In the case of *Lee* v. *Milner* (*a*), indeed, the Court of Exchequer did hold that the finding of the future damages could not be sustained, upon the ground that, in the absence of any actual and present damage, such finding must needs be uncertain and wild speculation. Supposing, however, that decision to be quite correct, it does not affect this case, because here the jury may have had sure grounds for ascertaining the amount of damage. In the case of *Rex* v. *The London Dock Company* (*b*) this Court held that the tenant of a public house, whose custom had been affected by the cutting off of communication by reason of the works of the Company, was not entitled to compensation: but in that case no part of the premises had been taken or touched by the Company.

The other cases cited respect the power of this Court and its right of interference where inferior Courts exceed their jurisdiction wholly or partially; a subject into which it is not needful for us to enter.

Upon the whole, we are of opinion that the rule must be discharged.

Rule discharged.

(*a*) 2 *M. & W.* 824. (*b*) 5 *A. & E.* 163.

The Queen *against* The Council of the Borough of Manchester.

Stat. 5 & 6 *Vict.* c. 111., confirming the charters of incorporation of certain boroughs, including *Manchester*, enacts (sect. 2) "that every officer of any such borough, or of any county or any division of a county in which any such borough is situated, who was in any office of profit at the time of the granting of any such charter," "whose office shall have been abolished, or who shall have been removed from his office, or who shall have been deprived of any part of the fees and emoluments of his office, in consequence of any such grant, shall be entitled to have an adequate compensation, to be assessed by the council and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, or for such part thereof as he shall have been so deprived of, regard being had to the manner of his appointment to the said office and his term or interest therein, and all other circumstances of the case;" and incorporates the provisions of stat. 5 & 6 *W.* 4. c. 76. relating to the claim of any corporate officer for compensation.

MANDAMUS (*a*) to the council of the borough of *Manchester*. The writ recited that, on or about 23 *October*, 2 *Vict.* (pursuant to the provisions of stat.

A mandamus to the council of *Manchester* recited grants of a charter of incorporation, separate commission of the peace, and separate court of quarter sessions to that borough. That *M.* was an officer of the *Manchester* division of the county of *Lancaster*, in which division *Manchester* was situated; "that is to say, holding the several offices of clerk to the magistrates for the county of *Lancaster*, acting for the said division of *Manchester*, otherwise called clerk to the justices of the petty sessions held for the said division, and clerk to the justices for the time being, appointed under stat. 53 *G.* 3. *c.* 72.," whose respective sittings were holden" &c. in *Salford*: that these offices were offices of profit, and *M.* had enjoyed emoluments therefrom; and that he had been deprived of part of the emoluments in consequence of the grants, and had claimed and been refused compensation. The writ then commanded the council to assess compensation. Return; That *M.* was not an officer of a division of the county, and had not been deprived of emoluments, as alleged. Issues thereon.

On the trial, it appeared that a stipendiary magistrate had been appointed for *Manchester* under stat. 53 *G.* 3. *c.* 72.; that, both before and after that appointment, the greater part of the business of petty sessions had been transacted at *Salford*, first, by some justices of the division, and, after the appointment of the stipendiary magistrate, by him together with some such justices; but some other business of petty sessions within the division was also transacted at two other places therein. *M.* had always acted as clerk to the magistrates and stipendiary magistrate at *Salford*, but not at the two other places; other persons having there acted as clerks. Loss of emolument in consequence of the grants was proved.

Held, that the traverses in the return were sustained. And, the Judge having left to the jury whether *M.* was a clerk to the justices of the division and to the stipendiary magistrate, and the jury having found in the affirmative, and a verdict having been entered for the Crown, a new trial was directed.

Quære, whether the office of clerk to the justices at petty sessions be within either stat. 5 & 6 *Vict.* *c.* 111. *s.* 2. or stat. 5 & 6 *W.* 4. *c.* 76. *s.* 66.

(*a*) See *Regina* v. *The Mayor of Manchester*, 5 *Q. B.* 402.

5 & 6 *W.* 4. *c.* 76. and of the several acts amending that statute), the Queen had granted a charter of incorporation to the borough of *Manchester* in the county of *Lancaster*, extending all the powers and provisions of the first mentioned act to the inhabitants of the borough in the district set forth in such charter. That afterwards, and before the passing of stat. 5 & 6 *Vict. c.* 111. (*a*), to wit in or about *February*, 2 *Vict.*, the Queen had granted, under the provisions of the first mentioned act (ss. 98, 103), a separate commission of the peace, and afterwards, to wit in or about *April*, 2nd *Vict.*, a separate Court

(*a*) "To confirm the incorporation of certain boroughs, and to indemnify such persons as have sustained loss thereby." (See *Rutter* v. *Chapman*, 8 *M. & W.* 1.)

Sect. 1, after referring to stat. 5 & 6 *W.* 4. *c.* 76., confirms the charters of incorporation and grants of separate courts of sessions of the peace, issued or granted to any boroughs since the passing of that act, and all acts or proceedings done or had in pursuance thereof.

Sect. 2 enacts: "That every officer of any such borough, or of any county or any division of a county in which any such borough is situated, who was in any office of profit at the time of the granting of any such charter of incorporation, or of any grant afterwards made by His late Majesty or by Her Majesty before the passing of this act, whose office shall have been abolished, or who shall have been removed from his office, or who shall have been deprived of any part of the fees and emoluments of his office, in consequence of any such grant, shall be entitled to have an adequate compensation, to be assessed by the council and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, or for such part thereof as he shall have been so deprived of, regard being had to the manner of his appointment to the said office and his term or interest therein, and all other circumstances of the case; and all the provisions of the first-recited act relating to the claim of any corporate officer for compensation, and to the manner of determining and securing the amount of such compensation, shall apply severally to the officers hereby indemnified: provided always, that the statements to be delivered to the town clerks of the said several boroughs by the said officers shall set forth the fees and emoluments in respect whereof they shall claim compensation during five years next before the several times when the profits of their several offices were first affected by any of the said grants respectively."

of Quarter Sessions, to be holden in and for the said borough. That, before and at the several times of the granting of such charter of incorporation and of such separate commission of the peace and such separate Court of Quarter Sessions as aforesaid, *Oswald Milne* was an officer of a division of the said county of *Lancaster*, that is to say, of the *Manchester* division of the said county, and in which said division of the said county of *Lancaster* the said borough of *Manchester* was and is situated; that is to say, holding and in the several offices of clerk to the magistrates for the county of *Lancaster* acting for the said division of *Manchester*, otherwise called clerk to the justices of the petty sessions held for the said division, and clerk to the justices for the time being, appointed under stat. 53 *G.* 3. *c.* 72. (*a*), whose respective sittings were holden at the New Bailey Court House in *Salford*: the same offices, at the several times of such grants to the said borough as aforesaid, being severally offices of profit; and the said *O. M.*, by virtue of holding and being in such offices respectively, being entitled to and enjoying certain fees and emoluments therefrom. That, in consequence of such several grants to the said borough as aforesaid, *O. M.* had

(*a*) "For the more effectual administration of the office of a justice of the peace within the townships of *Manchester* and *Salford*, in the county palatine of *Lancaster*; and to provide, by means of a rate on the said townships and otherwise, a competent salary to a justice of the peace acting within the said townships; and to enable the constables of *Manchester* and *Salford* to take recognizances in certain cases."

The first four sections, after a recital, in sect. 1, that, "from the magnitude and importance of the business of a justice of the peace within the townships of *Manchester* and *Salford*, in the hundred of *Salford*, in the county palatine of *Lancaster*, and the other townships composing the division of *Manchester*," a sufficient number of justices are not found to act &c., enable the Crown, in right of the Duchy and County palatine of *Lancaster*, to appoint a barrister, at an annual salary of 1000*l.*, "to execute the office of a justice of the peace within the said division."

sustained the loss, and been deprived, of great part of the fees and emoluments of the said several offices. That thereupon, in pursuance of the provisions of stat. 5 & 6 *Vict. c.* 111., *O. M.* had become and was entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, of the said borough, for the fees and emoluments of his said several offices which he had lost and been deprived of as aforesaid. That *O. M.*, since the passing of the said last mentioned act, to wit &c., did deliver to the town clerk of the borough a certain statement, under his hand, setting forth the amount received by him in every year during the period of five years next before the time when the profits of the said offices were affected by the said grants, on account of the fees, &c., whereof he claimed compensation, distinguishing the office, &c., in respect whereof the same had been received, and containing a declaration that the same was a true statement, according to the best of his knowledge, &c.; and also setting forth the sum claimed by him as such compensation, according to the directions of the first mentioned act: which statement was laid before the council of the borough, who thereupon took the same into consideration, and determined thereon that said *O. M.* was not entitled to compensation out of the borough fund of the borough, and then and there wholly disallowed the claim of *O. M.* to compensation, and did not assess any compensation to *O. M.* for the loss of such fees, &c., as he had sustained and been deprived of as aforesaid; nor hath any compensation been since at any time assessed to *O. M.* in respect of the same, to the great damage &c. The writ then commanded the council to assess an

adequate compensation to be paid out of the borough fund to *O. M.* for the loss of the fees and emoluments of the said several offices of which he had been deprived in consequence of the said several grants to the said borough as aforesaid, &c.

Return. "That the said *Oswald Milne*" "was not, at the several times in the said writ of mandamus in that behalf respectively mentioned, or any of them, an officer of a division of the said county of *Lancaster*, as in the writ of mandamus is in that behalf suggested and alleged." And, further, "that the said *Oswald Milne*" "has not sustained the loss, or been deprived, of great part, or of any, of the said fees and emoluments in the said writ mentioned, in consequence of the said several grants in the said writ mentioned, or of any of them, as is in and by the said writ in that behalf suggested and alleged." And, for the causes aforesaid, the council have not assessed, and cannot and ought not to assess &c.

Pleas: 1. That said *O. M.* was an officer of a division of the said county of *Lancaster*, in manner &c. 2. That *O. M.* has sustained the loss, &c., in manner &c. Issues were joined on these traverses.

On the trial, before *Cresswell* J., at the *Lancashire* Summer assizes, 1844, it appeared that Mr. *Milne* began to act as clerk to magistrates acting in the *Manchester* division in 1808, together with his father, and continued to act as such clerk till the appointment of the stipendiary magistrate after mentioned. The *Manchester* division consisted of forty three places, or townships, of which *Salford* was one. The greater part of the business of petty sessions was transacted by the magistrates who met at *Salford*; and, at such meetings, Mr. *Milne* had acted as clerk for several years. But

some magistrates met at two other townships, *Heaton Norris* and *Worsley*, within the division, and transacted some business of petty sessions there; and Mr. *Milne* did not act as clerk at the meetings holden as last mentioned, but the magistrates there employed other clerks.

In 1813, under stat. 53 *G.* 3. *c.* 72., a stipendiary magistrate was appointed to execute the office of a justice of the peace for the county within the division of *Manchester*, either by himself or with other justices of the division, and to sit daily at the New Bailey at *Salford*. Accordingly, he in general attended each day at the New Bailey, assisted occasionally by other magistrates, who either sat with him or took his place. Mr. *Milne*, by direction of the stipendiary magistrate, acted as his clerk, generally attending daily at these sittings at the the New Bailey, and transacting the business there as clerk. It appeared that the most important part of the petty sessions business of the division was, as before, transacted here, by a meeting every week which was usually attended by the stipendiary magistrate and one of the other magistrates in rotation. But it also appeared that there were, as before, other petty sessions holden by magistrates acting at *Worsley* and *Heaton Norris*, within the division, where Mr. *Milne* did not act as clerk. He continued to act, in this way, as clerk to successive stipendiary magistrates, down to the date of the writ.

On *October* 23d, 1838, a charter of incorporation was granted to the borough of *Manchester*, under stat. 5 & 6 *W.* 4. *c.* 76. On 7th *February* 1839, a separate commission of the peace, and, on 1st *April* 1839, a separate Quarter Sessions, were granted to the borough; which

grants were confirmed by stat. 5 & 6 *Vict. c.* 111. *s.* 1. On the grant of the separate commission of the peace to the borough, a gentleman named *Higson* was appointed clerk to the justices of the borough, under stat. 5 & 6 *W.* 4. *c.* 76. *s.* 102., and another person for conducting the prosecution of offenders committed by the justices of the peace for the borough.

Upon these facts it was contended, on the part of the Crown, that Mr. *Milne* was entitled to compensation under stat. 5 & 6 *Vict. c.* 111. *s.* 2.; first, as an officer of the *Manchester* division of the county of *Lancaster;* secondly, as having held an office of profit, viz. that of clerk to the stipendiary magistrate for the division, and having been deprived of part of the fees and emoluments arising from such office. On the part of the corporation, it was admitted that the effect of the grants had been to lessen the profits derived by Mr. *Milne* from his employments above described.

The learned Judge left to the jury the questions, whether the facts, as above shewn, made out that Mr. *Milne* was clerk to the magistrates of the division of *Manchester*, and that he was appointed and acted as clerk to the stipendiary magistrate. The jury found, as to both questions, in the affirmative: upon which the learned Judge directed a verdict for the Crown.

In *Michaelmas* term, 1844, *Kelly* obtained a rule nisi to enter a verdict for the defendants, or for a new trial on the ground of misdirection.

In *Hilary* term and vacation 1846 (*a*),

(*a*) The case was argued on *January* 19th, before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.; and on *February* 11th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

Sir *F. Thesiger*, Attorney General, *Starkie* and *Cowling*, shewed cause; and Sir *F. Kelly*, Solicitor General, and *Martin* were heard in support of the rule. The points argued will appear sufficiently from the judgment of the Court: the cases cited are mentioned in the notes.

Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*June* 27th), delivered the judgment of the Court.

This was an application for a mandamus to assess compensation to Mr. *Oswald Milne* for the loss of the profits and emoluments of the several offices of clerk to the magistrates for the division of *Manchester*, and of clerk to the justice, for the time being, appointed under stat. 53 *G.* 3. *c.* 72., and of the prosecuting offenders (*a*), and other business connected with the said division. The case went down to trial at *Liverpool*, before my brother *Cresswell*; and a verdict was taken, under his direction, for the Crown. We were moved to enter a verdict for the defendants, or to grant a new trial for misdirection.

The claim to compensation was founded upon the second section of stat. 5 & 6 *Vict. c.* 111.

That statute was passed for removing doubts as to the validity of the charters granted to certain boroughs in pursuance of stat. 5 & 6 *W.* 4. *c.* 76. and the acts subsequently passed to amend that act, and confirmed such charters, amongst which was the charter granted to the borough of *Manchester*. (His Lordship here read

(*a*) On the application, the mandamus was refused as to the profits of prosecuting offenders; *Regina* v. *The Mayor of Manchester*, 5 *Q. B.* 402.

the second section of stat. 5 & 6 *Vict. c.* 111 (*a*).) To be entitled to compensation under the statute, Mr. *Oswald Milne* must have been either an officer of the borough, or of the county, or of the division of the county in which the borough was situate.

He claimed, in the first place, as having held the office of clerk to the magistrates acting for the division of *Manchester* in the county of *Lancaster*. It appeared that there was a division called the division of *Manchester*, consisting of forty three townships, and that the general business of the division was done at the New Bailey in *Salford*, and that Mr. *Milne* acted as clerk to the magistrates of the division who attended at the New Bailey. But it also appeared that some of the justices of the division met at *Worsley* and others at *Heaton Norris*, both being townships within the division, and did petty sessions business there; and that such justices employed different clerks on such occasions. Mr. *Oswald Milne* does not appear to have been at any time clerk to the justices of the division generally, or to have held any appointment as such, but only to have acted as clerk to such of the justices of the division as attended at the New Bailey at *Salford*, there being other persons who acted as clerks to such of the justices of the division as attended at *Worsley* and *Heaton Norris*.

Without considering the very uncertain nature of the office he appears to have held (*b*), it is clear that

(*a*) Antè, p. 459, note (*a*).

(*b*) The following authorities were referred to in the argument.

On the general question, what were offices entitled to compensation: Stat. 5 & 6 *W.* 4. *c.* 76. *ss.* 66, 141.; stat. 5 & 6 *Vict. c.* 111. *s.* 2. (antè, p. 459, note (*a*)); *Rex* v. *The Mayor, &c., of Bridgewater*, 6 *A. & E.* 339; *Regina* v. *The Mayor, &c., of Carmarthen*, 11 *A. & E.* 9; *Re-*

he did not hold it for the whole division: he was *not* clerk to the justices for the division of *Manchester*, but only to such of them as attended at *Salford;* and, if Mr. *Milne* is entitled to compensation as clerk to the magistrates of the division, it would be difficult to refuse it to those who acted as clerks to the justices who met at *Worsley* and *Heaton Norris*, and who might also claim to be clerks to the justices acting for the division of *Manchester*. We therefore think that Mr. *Milne* is not entitled to compensation as clerk to the justices for the division of *Manchester*.

We also think that there is still less ground for claim to compensation for loss of profits and emoluments of the office of clerk to the stipendiary magistrate appointed under stat. 53 *G.* 3. *c.* 72. That office Mr. *Milne* still holds; and the claim is therefore only in respect of diminution of profits. But we think it unnecessary to consider whether the diminution is from causes that would entitle him to compensation, as we are clearly of opinion that the clerk to the stipendiary magistrate is not an officer of the borough, county or division of the county within the meaning of stat. 5 & 6 *Vict. c.* 111. *s.* 2. He is merely clerk to that single magistrate, and, as such, can have no claim to compensation.

The learned Judge, at the trial of this case, took a

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gina v. *The Mayor, &c. of York*, 3 *Q. B.* 550; *Regina* v. *The Corporation of Poole*, 7 *A. & E.* 730; *Ex parte Harvey*, 7 *A. & E.* 739.

On the nature of the office of clerk to the justices at petty sessions, and to the stipendiary magistrate: *Com. Dig. Courts* (P 9.); *Harding* v. *Pollock*, 6 *Bing.* 25; stat. 26 *G.* 2. *c.* 14.; stat. 5 *G.* 4. *c.* 96. *s.* 30.; stat. 9 *G.* 4. *c.* 61. *s.* 15.; stat. 6 *G.* 4. *c.* 50. *s.* 10.; stat. 5 & 6 *Vict. c.* 109. *s.* 14.; stat. 7 & 8 *Vict. c.* 101. *s.* 11.; *Ex parte Sandys*, 4 *B. & Ad.* 863.

On the legal properties of divisions of counties: stat. 9 *G.* 4. *c.* 43.; stat. 6 & 7 *W.* 4. *c.* 12.; stat. 8 & 9 *Vict. c.* 10. *s.* 10.

different view of the act of Parliament and of the evidence; and, under his direction, a verdict was found for the Crown. We are of opinion that that verdict cannot be supported: but we do not find that any leave was given to enter a verdict for the defendants. Therefore the rule for a new trial must be made absolute.

We wish, however, to observe that, though the form of the issues made it necessary to take the opinion of the jury, the question decided was, in truth, matter of law, and the facts undisputed. We would therefore suggest the statement of a case which may be turned into a special verdict.

Rule absolute (*a*).

(*a*) The case has hitherto proceeded no farther.

Part of the above report is by *H. Merivale*, Esq.

Queen's Bench.
1846

DIMES *against* The Company of Proprietors of The GRAND JUNCTION Canal.

TRESPASS for mesne profits. The declaration charged that defendants, on 18th *May* 1836, with force &c., broke and entered certain closes of plaintiff, in the parish of *Rickmansworth*, otherwise *Rickmersworth*, in *Hertfordshire*, and ejected and expelled plaintiff &c., and kept and continued him so expelled &c., and took the issues and profits &c.

Pleas: 1. Not guilty. Issue thereon.

2. That the closes in which &c., in the declaration

Stat. 11 *G.* 4. & 1 *W.* 4. *c.* 65. *s.* 9., enacting that no infant shall *forfeit* copyhold land for his neglect or refusal to be admitted, does not prevent the lord from seizing *quousque*.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

A canal company was authorized by statute (33 *G.* 3. *c.* 80.) to purchase land, on voluntary or compulsory sale by the persons interested (at prices to be agreed upon, or ascertained by commissioners or a jury); and a form of conveyance was prescribed, purporting that the party granted all his "right, title, and interest, to and in the same, and every part thereof, to hold to the said Company for ever." The Company were authorized to enter upon payment of price, or tender, &c.; and were made liable to render compensation for damage done by their works, &c., if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the Company, who paid him the price, and entered.

Held, by the Court of Exchequer Chamber,

That this conveyance passed only such interest as the copyholder could convey without the lord, and that, on the copyholder's death, no other person having been admitted, the lord might seize quousque for want of a tenant, and maintain ejectment, and an action for mesne profits, against the Company.

That, the copyholder having devised generally his property called *F.*, which comprehended the land in question, subject to payment of his debts, and other payments, the legal title to the land in question did not pass to the devisee, but descended to the copyholder's heir at law.

That, in an action by the lord against the Company for mesne profits, it appearing by special verdict that the steward had made a warrant of seizure, commanding the bailiff, generally, "to seize" the land "into the hands of the lord of the manor," and the bailiff did, in pursuance of the warrant, seize into the hands of the lord until a tenant should come in and be admitted, this must be considered only a seizure quousque.

That, in order to entitle the lord so to seize, there ought to be proclamations at three consecutive courts baron. But that, when, in an action by the lord in his own name for mesne profits, a special verdict found a custom to seize after three consecutive courts baron, and that there had been a recovery in ejectment on the lord's demise, (which recovery was not put on the record by way of estoppel), and that proclamation had been made in three courts, but it was not found whether they were, or were not, consecutive, it must be considered that the proclamations were regular, though the jury would have been at liberty to find the contrary.

mentioned, at the said times when &c., were not, nor was either of them, or any part thereof, the closes or close of plaintiff, in manner &c. Conclusion to the country. Issue thereon.

On the trial, before Lord *Abinger* C. B., at the *Hertfordshire* summer assizes, 1840, a special verdict was found, the material parts of which are as follows.

One *Joseph Skidmore* died, previously to the 14th of *April* 1784, seised of certain copyhold lands, described in the presentment of admittance next mentioned, lying and being within the manor of *Rickmansworth*, in *Hertfordshire*. The verdict then traced the title to *Joseph Skidmore*'s son, named also *Joseph Skidmore*, and found that the last mentioned *Joseph Skidmore* was, on 30th *March* 1785, admitted as tenant of (among other parcels) a copyhold messuage or tenement, farm, &c., called *Frogmores*, together with a meadow thereto belonging called *Hogshaws*, otherwise *Round Mead*, situate &c. in the parish of *Rickmersworth*, to hold unto him, his heirs and assigns, of the lord by the rod, at the will of the lord, according to the custom of the manor.

The verdict then stated the passing, afterwards, and before the commencement of this suit, on days severally named, of certain Acts of Parliament, viz.: stats. (*a*)

(*a*) These statutes contain enactments relating to the *Grand Junction* Canal Company. Several sections of the acts were cited by counsel in the argument, as illustrating the general policy of the legislature with respect to the rights and liabilities of the Company; but the only clauses on which the Court rested their judgment are the following.

Stat. 33 *G.* 3. *c.* 80. is entitled "An act for making and maintaining a navigable canal from the *Oxford* canal navigation, at *Braunston*, in the county of *Northampton*, to join the river *Thames* at or near *Brentford*, in the county of *Middlesex*, and also certain collateral cuts" &c.

Sect. 1 incorporates "The Company of proprietors of the *Grand Junction* Canal" by that name, empowers them to purchase lands for

33 *G.* 3. *c.* 80., 34 *G.* 3. *c.* 24., 35 *G.* 3. *c.* 8., 35 *G.* 3. *c.* 85., 36 *G.* 3. *c.* 25., and stats. (local and personal, public) 38 *G.* 3. *c.* xxxiii., 41 *G.* 3. (U. K.) *c.* lxxi.,

the use of the navigation, to make and complete a canal, to be called "The *Grand Junction* Canal," to supply it with water from brooks, &c., within certain distances, to make machines, reservoirs, soughs, &c., to cleanse, enlarge, &c. streams, &c.; "and for the purposes aforesaid," the Company are "hereby authorized and empowered to enter into and upon the lands and grounds of any person or persons, bodies politick, corporate or collegiate, whatsoever, and to survey and take levels of the same, or any part thereof, and to set out and ascertain such parts thereof as they shall think necessary and proper for making" the canal, reservoirs, &c., and to bore, dig, &c., carry away, and lay earth, stone, trees, &c., or other things which may be dug or got, in making the canal &c., or out of the lands adjoining, which may be proper for making, &c. the canal, &c., and to make, on the canal &c. or lands adjoining, bridges, aqueducts, reservoirs, houses, machines, &c., and do all other matters and things which they shall think convenient for making, &c., the canal and other works; doing as little damage as may be, "and making satisfaction in manner hereinafter mentioned, to the owners or proprietors of, and all persons interested in the lands, tenements, or hereditaments, waters, watercourses, brooks, or rivers respectively, which shall be taken, used, removed, diverted, or prejudiced, for all damages to be by them sustained in or by the execution of all or any of the powers of this act; and this act shall be sufficient to indemnify the said Company of proprietors and their deputies," &c., "and all other persons whomsoever, for what they or any of them shall do by virtue of the powers hereby granted, subject nevertheless to such provisoes and restrictions as are hereinafter mentioned." Sect. 5 provides for a map and books of reference describing the line of the canal &c.

Sect. 9 enacts: "That after any such part or parts of the said lands or grounds shall be so set out and ascertained as aforesaid for making the said canal" &c., "and for providing and constructing the wharfs, and other works and conveniences hereinbefore mentioned, or any of them, it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, and feoffees in trust, committees, executors, and administrators, and all other trustees or persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of their cestui que trusts, whether infants, issue unborn, lunatics, idiots, femes covert, or other person or persons, and to and for all femes covert who are or shall be seised, possessed, or interested in their own right, and

43 *G.* 3. *c.* viii., 45 *G.*3. *c.* lxviii., 51 *G.* 3. *c.* clxix., 52 *G.* 3. *c.* cxl., 52 *G.* 3. *c.* cxcv., 53 *G.* 3. *c.* xxxii., 56 *G.* 3. *c.* lxxxv., 58 *G.* 3. *c.* xvi., 59 *G.* 3. *c.* lxvi., 1 & 2 *G.* 4. *c.* xliii., 7 *G.* 4. *c.* cxl.

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for every other person or persons whomsoever, who is, are, or shall be seised, possessed of, or interested in any lands, grounds, and hereditaments which shall be so set out and ascertained for the purposes aforesaid, to contract for, sell, or convey the same, and every part thereof, unto the said Company of proprietors; and if it shall happen that by making the said canal, or collateral cuts, or any of them, or the conveyance of water thereto, the property of any land owner or land owners shall be separated into small parcels, so as to render the occupation thereof inconvenient, it shall be lawful for such bodies politic," &c., "and all such other person and persons as aforesaid, by and with the consent of the Commissioners hereby appointed, or any five or more of them to be testified by writing" &c., "to contract for, sell, and dispose of, or to convey in exchange for other lands, all or any part of such small parcels of land to any person or persons whomsoever, for such price or prices in money or other equivalent, as to such land owner or owners shall seem reasonable; and all such contracts, agreements, sales, conveyances, and assurances, shall be valid and effectual in law, to all intents" &c., "any law, statute, usage, or custom, to the contrary thereof in any wise notwithstanding: and all bodies politic," &c., "and all persons whomsoever, so conveying or exchanging as aforesaid, are hereby indemnified for or in respect of any such sale or exchange which he, she, or they, or any of them, shall respectively make by virtue or in pursuance of this act; and all such contracts, agreements, sales, conveyances, and assurances, shall be made at the expence of the said Company of proprietors; and such of them as shall be made of any lands or other hereditaments to the said Company of proprietors shall be made according to the form following, viz.:

I *A. B.* of in consideration of the sum of to me paid (or in consideration of the annual rent of to me to be hereafter yielded and paid, by yearly or half yearly payments, as may be agreed upon) by the Company of proprietors of the *Grand Junction* Canal, do hereby grant and release to the said Company, all (describing the premises to be conveyed), and all my right, title, and interest, to and in the same, and every part thereof, to hold to the said Company for ever, by virtue and according to the true intent and meaning of the act of parliament, passed for making and maintaining the said *Grand Junction* Canal. In witness whereof I have hereunto set my hand and seal, this day of A. D. Which said

The jury further found that, on 13th *March* 1797, the last mentioned *Joseph Skidmore* made his deed as follows:

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conveyances shall be kept by the clerk or clerks to the said Company of proprietors," who shall, when requested, deliver attested copies. "And every such conveyance as aforesaid which shall be made to any person or persons other than the said Company of proprietors, shall be according to the following form:

I *A. B.* do hereby, by virtue and in pursuance of a certain act of parliament, intituled, (insert the title of the act), and by and with the consent and approbation of five or more of the commissioners appointed under, or by virtue of the said act, testified by their signatures hereto, and in consideration of the sum of to me in hand paid by *C. D.* at or before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge (or in exchange for certain lands, situate conveyed to me by *C. D.* by writing under his hand and seal, bearing even date herewith), convey and assign to the said *C. D.* all (describe the premises) to hold to the said *C. D.* his heirs and assigns for ever, as witness my hand and seal, this day of .

And every such conveyance shall be valid and effectual.

Sect. 10 enacts that all and any bodies politick, &c., "or other persons hereinbefore capacitated to sell or convey lands and other hereditaments, or any other owner or owners, and the occupier or occupiers of any lands or other hereditaments" through or on which the canal and other works are intended to be made, or mills, forges, or other works from which water may be diverted, "may accept and receive satisfaction for the value of such lands and grounds, mills, forges, or other works and hereditaments, and for the damages to be sustained by making and completing the said works herein-before directed, either in gross sums, or by annual rents, as shall be agreed upon by and between the said owners and occupiers respectively, or any of them, and the said Company of proprietors; and from and immediately after the time of making and executing such sale and conveyance, or any contract or contracts for the same, the said Company of proprietors may and shall be at liberty to enter upon, and from thenceforth for ever to have, take, and enjoy the said lands, grounds, and other hereditaments, for the uses and maintenance of the said canal and cuts respectively, and for the supplying the same with water, without any interruption or eviction whatsoever; and in case the said Company of proprietors, and the said parties interested in such lands and grounds, or other hereditaments, cannot agree as to the amount or value of such satisfaction, the same shall be ascertained and settled by the commissioners

"*Rickmansworth, Hertfordshire.* Land purchased of Mr. *Joseph Skidmore.*" I, *Joseph Skidmore*, of" &c., "in consideration of the sum of 308*l.* 10*s.* to me paid by the Company of proprietors

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hereinafter appointed, in such manner, and subject to such verdict of a jury, if required, as is hereinafter directed."

Sections 11, 12, 13, 14 appoint and regulate the qualification and proceedings of "commissioners" (sect. 11) "for settling, determining, and adjusting, all matters, questions, and differences which shall or may arise between the said Company of proprietors and the several proprietors of and persons interested in any lands, grounds, tenements, mills, mines, waters, hereditaments or premises, which shall or may be taken, used, affected, or prejudiced by the execution of any of the powers hereby granted."

Sect. 15 enacts that, "upon any refusal of any owner or owners, occupier or occupiers of, or any other person or persons interested in any lands," &c., "to accept the money or compensation which shall be offered for or in respect of the same" by the Company, it shall be lawful for the Company, owner, or occupier, or person interested, to apply for a meeting of the commissioners, as to which regulations are made.

Sect 16 empowers and enables the commissioners "to determine and adjust from time to time, on any such request and application as aforesaid, what sum or sums of money shall be paid by the said Company of proprietors (either in gross or by an annual rent or payment) for the absolute purchase of, or as a recompence for the use of the lands, grounds, or hereditaments, which shall be set out and ascertained as aforesaid, for making the said canal and collateral cuts, or any part thereof, and for other the purposes herein-mentioned; and also to adjust and determine the compensation to be made by the said Company of proprietors, for any damages which may or shall be at any time or times hereafter sustained by any bodies politic, corporate, or collegiate, or by any person or persons respectively, being owners of or interested in any lands, grounds, tenements, mills, mines, or other hereditaments, for or by reason of the severing or dividing the same, or by reason of the making, using, repairing, or maintaining the said canal and collateral cuts respectively, and the reservoirs, aqueducts," &c., "watercourses, roads, ways, railways, or other works" &c., "or by supplying the same, or any of them, with water as aforesaid, or by the flowing, leaking, or oozing of water over or through the banks of the said canal and collateral cuts, reservoirs," &c., "or over or through any passages, gutters, or watercourses which shall be made pursuant to the powers hereby given, or by not cleansing the same, or by diverting any stream or brook into the same, or by the reason or means of the execution of any of the powers herein contained."

of the *Grand Junction* Canal, do hereby grant and release to the said Company all that" "piece or parcel of land or ground containing by admeasurement" &c.,

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Sect. 17 enables the Company, or persons &c. interested as aforesaid, if dissatisfied with the determination of the commissioners, to bring the case before a jury, who shall "enquire of, assess and ascertain, and give a verdict for the sum or sums of money, or the annual rent or rents, which shall be paid for the purchase, or for the hire and use of such lands or grounds, mills, mines, waters, and hereditaments, and the compensation which shall be made for the damages sustained as aforesaid, and the said commissioners shall give judgment for such purchase money, rent, recompence, or compensation so assessed by such jury, which said verdict, and the judgment thereupon pronounced by the said commissioners, shall be binding and conclusive, to all intents and purposes, against all bodies politic," &c., "and against all persons whomsoever." And sect. 18 provides for assessment by a jury when parties refuse to treat.

Sect. 21 enacts that the commissioners shall not take notice of any complaint "by any person or persons whomsoever, for any injury or damage by him, her, or them, sustained, or supposed to be sustained," unless application as therein provided shall have been made "within the space of six calendar months next after the time that such supposed injury or damage shall have been sustained, or the doing or committing thereof shall have ceased"

Sect. 24 provides that the commissioners and juries shall award "concerning the value of lands, mills, and other hereditaments, separately and distinctly from the consideration of any other damages sustained or to be sustained as aforesaid, and shall distinguish the value set upon the lands and other hereditaments, and the money assessed or adjudged for such damages as aforesaid, separately and apart from each other."

Sect. 25 enacts that, on payment, or tender, or security given for payment, of the sum agreed upon, determined or assessed for recompence and compensation, or, if the parties cannot be found or refuse to accept the same, then on investiture thereof in the public funds or government securities (as specified in the clause), and in certain cases upon depositing the money, the Company may enter upon the lands &c., and thereupon such lands &c., "and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said Company of proprietors, to and for the purposes of this act for ever; and such tender, payment, or investiture shall

"lately part of a certain other close or parcel of meadow ground" "situate, lying and being within the manor and parish of *Rickmansworth* aforesaid, commonly called or

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not only bar all right, title, claim, interest, and demand of the person or persons to whom the same shall or ought to have been made, but also shall extend to, and shall be deemed and construed to bar the dower of the wife of every such person, and all estates tail, and other estates in reversion and remainder, of his, her, or their issue, and of every other person whomsoever therein: provided nevertheless, that before such payment, security, tender, investment, or deposit, as aforesaid, it shall not be lawful" for the Company, or any person under them, to dig or cut the lands of the person entitled to such payment or security.

Sect. 30 provides that the Commissioners shall and may settle "what shares and proportions of the purchase money, or compensation for damages, which shall be so agreed for, determined, and adjusted, or assessed in manner respectively as aforesaid, shall be allowed to any tenant, or other person or persons, having a particular estate, term, or interest in the premises, for his, her, or their respective interest therein, and with due regard to the rights and interests of the lord or lords, lady or ladies, of any manor or manors whereof the lands or hereditaments to be affected by the said canal are respectively holden."

Sect. 101 reserves mines and minerals to the lord. See it more fully referred to in p. 518, note (*a*), post.

Sect. 103 empowers the Company to make any navigable branch from the canal, &c., "through or over any common or waste lands, with the consent, under the hands and seals, of the lord or lady of the manor, and also in, over, or through any other lands or grounds, with such consent of the owners thereof:" such branch, when made, to be deemed part of the canal for every purpose of the act: power is also given to any lord or lady of a manor, or to any owner &c., with such consent as aforesaid, and under other conditions, to make navigable communications, at "his, her and their own expense" &c.

Stat. 41 *G.* 3. *c.* lxxi. is entitled "An act for enabling the Company of proprietors of the *Grand Junction* Canal more effectually to provide for the discharge of their debts, and to complete the whole of the works to be executed by them, in pursuance of the several acts of the 33d, 34th, 35th, 36th and 38th years of the reign of his present Majesty; and for altering and enlarging the powers and provisions of the said acts."

Sect. 7 enacts: "That if any contract, agreement, bargain, sale, or exchange, of or concerning any lands, tenements, or hereditaments here-

known by the name of the *Round Mead*, and cut out and taken therefrom for making and forming the said *Grand Junction* Canal and towing path." (Other parcels

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after to be purchased, taken, or used by virtue of the powers of the said recited acts or this act, for the purposes thereof" (over and above what has been taken and already contracted for on account of the canal, collateral cuts, &c., or any railway already made or now under execution by the Company, or small separated pieces of land &c., which the Company have been compelled to purchase by virtue of the recited acts) "shall be made or entered into of any such lands, tenements, or hereditaments, which shall be copyhold, or of the nature of copyhold, shall [*sic*] be executed and completed by surrender thereof in the Court of the manor of which the same is or are holden according to the custom of such manor, and such lands, tenements, or hereditaments shall continue subject to the same fines, rents, and services as are due and payable, and of right accustomed in the same manor, as if this act had not been made, unless the lord or lords, lady or ladies of the manor for the time being, shall be willing or desirous of enfranchising the same, in which case such lord or lords, lady or ladies, is and are hereby empowered so to do, notwithstanding he, she, or they shall be seised of or entitled to the same manor or manors for a less interest than an estate of inheritance in fee simple, but inasmuch as the vesting and continuing of such copyhold premises in the said Company, as a body corporate, would prevent such lord or lords, lady or ladies from receiving such benefits of fines, heriots, and other services due upon death, descent, or alienation, in like manner as he, she, or they would have done in case such copyhold premises had continued to be the property of persons in their natural capacities; and in case the said lord or lords, lady or ladies, of the said manor or manors, shall decline to enfranchise the respective parcels of copyhold lands, tenements, and hereditaments, held of the said manor, which shall be so purchased by or vested in the said Company for the purposes aforesaid, he, she, or they shall be entitled to and shall be paid by the said Company a reasonable recompence and satisfaction for the loss that will arise to him, her, or them, in respect to such fines, heriots, or other services, the enjoyment of which will be diminished or lost by the vesting and continuing of such copyhold premises in a body corporate; which recompence and satisfaction, if not settled by agreement between the parties, shall be ascertained and settled by the commissioners appointed in such manner, and subject to such verdict of a jury, if required, as is directed by the said recited acts, or by arbitration in manner hereinafter enacted" &c.

were also conveyed). "All which said pieces or parcels of land or ground were lately in the tenure or occupation of *Thomas Gates*, his assigns or undertenants, and are particularly delineated and set forth in the plan (*a*) in the margin of these presents. And all my right, title and interest to and in the same and every part thereof: To hold to the said Company for ever, by virtue and according to the true intent and meaning of the act of parliament passed for making and maintaining the said *Grand Junction* Canal. In witness whereof" &c. (Signed and sealed by *Joseph Skidmore*; dated 13th *March* 1797).

"Received, on the day of the date of the above written deed of and from the said *Grand Junction* Canal Company, the sum of 308*l.* 10*s.* of lawful" &c., "being the consideration money expressed in the above conveyance; by me, *Joseph Skidmore*."

That the said lands so purchased by the said Company of the said *Joseph Skidmore* were, in 1797, formed into and used as parts of the canal by the Company, and that the same was so done with the knowledge of *Henry Fotherley Whitfield*, then being the lord of the said manor of *Rickmansworth*.

That, before and at the time of the conveyance before mentioned, the said *H. F. Whitfield* was lord of the manor of *Rickmansworth* aforesaid, and was seised in fee thereof, and continued so seised until 19th *September* 1813, when he died, leaving a will &c. The title to the manor, in fee, was then traced to the plaintiff, *William Dimes*, who was found to have been, since

(*a*) The plan was referred to and copied in the special verdict.

2nd *December* 1821, lord of the said manor, up to the commencement of this action.

That the last mentioned *Joseph Skidmore* died in *May* 1838, leaving a will, dated 4th *August* 1844, which was set out in the verdict; the material parts being as follows.

"I, *Joseph Skidmore*, of" &c., "order all my just debts, funeral expenses" &c. "to be in the first place fully paid, and every part thereof satisfied: and, after payment thereof, and of every part thereof, I give and bequeath all my freehold and copyhold estates and personal property whatsoever and wheresoever unto my nephews *Edmund Lucas* and *Skidmore Ashby*, for the aforesaid and following purposes, videlicet: To receive all the rents and profits of my estate and book debts, &c., and maintain my wife in the manner most agreeable to her, together with all my children," naming eight, "out of the aforesaid net proceeds of my estate, and leaving my wife to choose the occupation of a part of the said estates that may be most profitable and conducive to her and her childrens' comfort, until the decease of my wife, and not before my youngest daughter *Charlotte Skidmore* attains the age of twenty one years, and then, and not before, I give and bequeath unto my son *Joseph Skidmore*, his heirs, executors, administrators and assigns, all those three inns" &c. (partly copyhold, not including *Frogmore*). "I request my trustees to take up," "at my decease, all my other copyhold property in the name of the trustees. Also, at the decease of my wife, and when my youngest daughter attains the age of twenty one years, I desire my trustees and executors to sell" "all my copyhold estate called *Frogmore*, in the hamlet of *Batchworth*, and in the parish of *Rickmansworth*, to the best advantage, and to

pay the net proceeds thereof to my daughters," naming six, "equally to be divided between them, share and share alike: if either of them die before the time fixed for sale, then it shall fall into the equal division of my surviving daughters." "And I do hereby nominate, constitute and appoint my nephew *Edmund Lucas* and *Skidmore Ashby*, their heirs, executors and administrators, my trustees to, and executors of, this my will."

That, at a court baron held in and for the said manor of *Rickmansworth*, 21st *October* 1835, a presentment was made; which was set out. It was presented that *Joseph Skidmore* "died seised of all that messuage or tenement and farm called *Frogmore*, with part of a certain meadow thereto belonging called *Hogshaws Moor* or *Round Mead*, containing" &c., "within this manor," "parts of which said farm and mead, containing" &c., "have been converted into and form part of the *Grand Junction* Canal, to which said premises the said *Joseph Skidmore* was admitted" 30th *March* 1785. "That the said *Joseph Skidmore* duly made" &c. "his last will and testament" &c.: "whereupon the said *Edmund Lucas*, in his own proper person, comes into Court and prays to be admitted tenant to the said messuages or tenements, farm, lands, hereditaments and premises with their appurtenances, so devised to him by the said will of the said *Joseph Skidmore* as aforesaid, save and except so much or such part of the said farm called *Frogmore*, and the meadow called *Hogshaws Moor* or *Round Mead*, as now forms part of the *Grand Junction* Canal, which part so excepted contains" &c. "And the said *Edmund Lucas* is accordingly admitted tenant thereto (except as aforesaid)," &c., upon the trusts in the will.

That it is the custom of the said manor, after the decease of a copyholder, to make three proclamations at three several general courts baron, held in and for the said manor, for the party entitled to come in and be admitted: that the first of the said proclamations is *usually* made at the court at which the decease of the copyholder is presented and ascertained, and then at the two general courts baron next following respectively: that notice of holding such courts baron is given on the three *Sundays* next preceding the holding of the same, by the parish clerk reading in church a notice that such court will be held, and by the placing a notice on the church door that such court will be held. That three such notices were given and read, in manner and form as above stated, before the holding of each of the courts as next mentioned.

That, on 24th *February* 1836, proclamation was made for the person or persons entitled to be admitted to the premises in question, of which the said *Joseph Skidmore* lately died seised, to come in and be admitted thereto, at a court baron held in and for the said manor: which proclamation is in the words following; that is to say:

"Manor of *Rickmersworth* in the county of *Hertford.* } The general court baron of *William Dimes*, Esq., lord of the said manor, there held on *Wednesday* the 24th day of *February*, in the year of our Lord, 1836, before *George Quilton* the younger, steward of the said manor."

"First proclamation for persons entitled to part of estate, late *Joseph Skidmore.* } At this court proclamation is made for the person or persons entitled to be admitted to all that piece or parcel of land containing" &c., "now forming part of the *Grand Junction* Canal, formerly part of the estate called *Frog-*

more and *Hogshaws Moor* or *Round Mead*, situate at *Batchworth* within this manor, and of which *Joseph Skidmore*, one of the customary tenants of the said manor, lately died seised, to come into Court and be admitted thereto: but no one comes."

That, on 6th *April* 1836, another proclamation for the like purpose was made at a court baron then held in and for the said manor: which proclamation was set out as follows:

"Manor of *Rickmersworth* in the county of *Hertford.* } The court leet with a view of frankpledge, and court baron of *William Dimes*, Esquire, lord of the said manor" &c.

Then followed the second proclamation, in the same terms as the first.

That, on 11th *May* 1836, at a court baron held in and for the said manor, a third proclamation for the like purpose was made: which proclamation was set out as follows:

"Manor of *Rickmersworth* in the county of *Hertford.* } The general court baron of *William Dimes*, Esquire, lord of the said manor, there held" &c.

Then followed a third proclamation in the same terms as the two others; and the entry went on as follows.

"Warrant of seizure. Whereupon, at this court, a precept is issued by the steward aforesaid, directed to *Thomas Wilson*, the bailiff of the said manor, commanding him to enter upon the said hereditaments and premises, and to seize the same into the hands of the lord of this manor. And during the sitting of this court the said bailiff returned that, by virtue of the said precept

to him directed, he had entered into all and singular the said piece or parcel of land, hereditaments and premises, with the appurtenances, and seized the same into the hands of the lord of the said manor, as by the said precept he was commanded."

That the lands described in the aforesaid warrant were seized, to wit on the 11th day of *May* A.D. 1836, by the bailiff of the said manor, in pursuance of the warrant aforesaid, into the hands of the lord of the said manor until a tenant thereof should come in and be admitted of the manor aforesaid. And that the said bailiff so seized the said lands by walking over the towing path of the same, and reading his warrant to seize the same in the hearing of several persons then and there present, and by bringing away a part of the soil thereof.

That the said plaintiff, *William Dimes*, in or as of *Trinity* term 3 *W.* 4., commenced an action of trespass and ejectment in the Court of Queen's Bench (*a*) in the name of one *John Doe*, as lessee of him the said *William Dimes*, against one *Richard Roe*, a casual ejector, for the recovery of the possession of five acres of land covered with water, &c., and five acres of other land, with the appurtenances, situate and being in the parish of *Rickmersworth* in the county &c., and caused a declaration in the said action to be delivered to the defendants, then tenants in possession of the demised premises, with the appurtenances. And such proceedings were thereupon had in the said Court that the said *William Dimes*, in the name of the said *John Doe*, to

(*a*) See note at the end of this case, p. 518.

wit in *Trinity* term 1 *Victoria*, by the consideration of the same Court, recovered against the said Company a certain term then to come of and in the said demised premises, with the appurtenances, and also his damages &c.; and afterwards, in the same term, a certain writ of her said Majesty issued &c., upon the said judgment, to cause *John Doe*, as lessee of *William Dimes*, to have possession of his said term then to come, among other things, of and in the said demised premises, with the appurtenances as aforesaid. That, by virtue of the said writ, the sheriff of the county of *Hertford* delivered possession of the before mentioned term of and in the land covered with water, &c., in manner and form following, &c. (describing the entry of the officer, and his giving a turf to the bailiff of the manor). And the plaintiff then put a bar across the canal.

That the lands, and the land covered with water, the possession of which was so delivered as aforesaid, are the same lands as had been seized by the bailiff of the manor on the 11th *May* 1836, as before mentioned.

That *Thomas Emmott Skidmore* was and is the eldest son and heir of the said *Joseph Skidmore*, who died on the 13th *May* 1835, and that he was born on 18th *April* 1816, and was of age at the time of the presentment after mentioned.

That the said *Thomas Emmott Skidmore*, claiming to be such heir, and, as such, to be the trustee for the defendants, did, on the 6th *July* 1833, on the requisition of defendants, sign a request in triplicate, addressed to the plaintiff as lord of the manor, and to *James Warren*, who was then the steward of the manor, to hold a special Court and admit the said *Thomas Emmott Skid-*

more to the said copyhold premises: and that, on the following day, the same were duly served on the said plaintiff and the said steward, and a tender of 10*l.* for the expense of a special Court was duly made to the said steward, and refused by him, as ordered by the plaintiff. The request was then set out.

The special verdict concluded by leaving to the Court the question for whom the issues were to be severally found.

The case on the special verdict was argued in *Hilary* term, 1844 (*a*), by Sir *W. W. Follett*, Solicitor General, for the plaintiff, and *Kelly* for the defendants.

The arguments used, and the authorities cited (*b*), will appear sufficiently from the judgment of the Court, and from the arguments and judgment on the writ of error in the Exchequer Chamber.

Cur. adv. vult.

Lord DENMAN, C. J., in *Trinity* term (*May* 31st) 1844, delivered the judgment of the Court.

The material facts of this special verdict appear to be as follows. *Joseph Skidmore*, being seised in fee of certain copyhold premises in the manor of *Rickmansworth*, by deed, dated 13th *March*, 1797, conveyed the same to the *Grand Junction* Canal Company; and they were in that year formed into and used as part of the canal with the knowledge of the then lord of the manor.

(*a*) *January* 16th. Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js.

(*b*) All the authorities mentioned on the argument in the Queen's Bench (except *Rex* v. *The London Dock Company*, 5 *A. & E.* 163.) are among those cited in the Exchequer Chamber.

In 1821 the present plaintiff became lord of the manor by purchase. In *May* 1835, *Joseph Skidmore* died; whereupon three proclamations were made for his heir to come in and be admitted; and, on his not coming in, the premises were seized into the hands of the lord, an action of ejectment was brought, and judgment obtained; and then the present action brought for mesne profits. The defendants pleaded, 1st, Not guilty; and, 2dly, That the plaintiff was not possessed. For the defendants it is contended that, by the acts of parliament under which the defendants made their canal, and the conveyance of *Joseph Skidmore*, the copyhold tenure of the premises was destroyed and the lord's right turned into a mere right to compensation, or that the Company became copyhold tenants and *Joseph Skidmore*'s estate was entirely gone. It is also contended that the special verdict does not shew the proclamations to have been properly made according to the custom of the manor, and that the seizure shewn was an absolute seizure and not a seizure quousque, in which case it would be void according to the authority of *Doe dem. Tarrant* v. *Hellier* (*a*). It is also contended that, as the heir of *Joseph Skidmore* was a minor at his death in 1835, he was protected from seizure by stats. 9 *Geo.* 1. *c.* 29. (*b*) and 11 *Geo.* 4. *&* 1 *W.* 4. *c.* 65. (*c*).

We do not think it necessary to express an opinion on any of these points, except that which arises on the statutes 9 *Geo.* 1. *c.* 29. and 11 *Geo.* 4. *&* 1 *W.* 4. *c.* 65. It is contended by the plaintiff that they relate only to forfeiture and not to seizure quousque, and are not applicable to the present case. Now it is plain from the

(*a*) 3 *T. R.* 162.
(*b*) See s. 5.
(*c*) See s. 9.

case of *King* v. *Dilliston* (*a*), and other cases, that, unless there be a special custom, a copyhold estate is not forfeited absolutely by neglect of the heir to come in and be admitted, but is only forfeited quousque: and, even where there is a custom to forfeit absolutely, persons under disability, unless expressly named, are not bound by it. If, therefore, the statutes 9 *Geo.* 1. *c.* 29. and 11 *Geo.* 4. *&* 1 *W.* 4. *c.* 65. be construed to apply only to absolute forfeitures, their operation will be confined to cases where there is a special custom for persons under disability to forfeit absolutely for want of coming in to be admitted. One can hardly conceive that cases of so extremely rare occurrence (if indeed any ever did occur) would be made the subject of legislative enactment. Moreover, the acts are much more applicable to seizures quousque; for they provide that in case of an infant heir the lord may after three proclamations appoint an attorney for the infant, and admit him by such attorney: he may then proceed to fix the fine, and, if it be not paid, may seize and hold until he has paid himself the fine and expenses; and then he is to give up the land to the heir.

Now these provisions manifestly are for the benefit of both parties, that the lord may have his fine at the proper time, and that the infant may not forfeit the profits of the land till the fine is paid, and afterwards pay the fine, but may be put in the same situation as if he had come in at once. There is no decided case which puts a different construction on these acts. And we are of opinion that, as the heir of *Joseph Skidmore* was an infant at the time of his death, having been born in

(*a*) 1 *Salk.* 386.

1816, the plaintiff was bound to pursue the course pointed out by those acts. It may be that the heir cannot be found; and it may not be known whether he be an infant; and, possibly, in such case, some distinction may be made: but this special verdict does not state any such fact.

Upon this latter ground, therefore, we think that the verdict must be entered for the plaintiff on the first issue, and for the defendants on the second.

Verdict accordingly. Judgment for defendants on the second issue.

Error was brought by the plaintiff in the Exchequer Chamber. In *Easter* (*a*) and *Trinity* (*b*) vacations 1845, and *Hilary* vacation (*c*) 1846, the case was argued.

Smythies, for the plaintiff in error (the plaintiff below). All the points which will be now raised for the defendants in error, except those arising on the construction of stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9., were decided in favour of the plaintiff by the Court of Queen's Bench, in the action of ejectment (*d*) referred to in the special verdict. That judgment has been approved of by Lord *Cottenham* C.; *Grand Junction Canal Company* v. *Dimes* (*e*): and the view of the Court of Queen's Bench appears to agree with that of *Shadwell* V. C. in *Grand*

(*a*) *May* 10th, 1845. Before *Tindal* C. J., *Pollock* C. B., *Coltman* and *Maule* Js., and *Parke* and *Rolfe* Bs.

(*b*) *June* 14th, 1845. Before the same Judges.

(*c*) *February* 3d, 1846. Before the same Judges.

(*d*) P. 518, note (*a*), post.

(*e*) 2 *Jurist*, 1077.

Junction Canal Company v. *Dimes* (*a*) in the Vice-Chancellor's Court. [The Court desired *Smythies* to confine his argument to the point decided in the present action against the plaintiff in the Queen's Bench.] It was assumed by the Court of Queen's Bench that the infant heir is entitled; but the plaintiff contends that the devisee under *Skidmore*'s will is the party entitled to be admitted; and stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9. applies only where the party entitled to be admitted is an infant, feme covert or lunatic. Where there is an infant entitled as devisee or heir, the statute directs that he shall be admitted; but provides that, if he does not appear, he shall not forfeit his land; and it enables the lord to admit him by guardian, and then enter on the land and take the profits till his fine is satisfied. It is not the infancy of the heir at law, merely as such, but that of the party entitled to be admitted, which protects from forfeiture under the statute, as was the case at common law; *King* v. *Dilliston* (*b*), where the infant was heir of an unadmitted surrenderee, and had therefore no legal estate. It will be urged, for the Company, that, the testator being a bare trustee for them, a devise in general words of all his real estates, charged with the payment of his debts, will not pass the trust estate. But the testator proceeds to direct his trustees to take up his copyhold *Frogmore*, and then to sell it: and, therefore, the question is simply, what does "*Frogmore*" mean? In the entry, on the rolls, of the testator's admittance, it clearly includes the land now forming the canal: and the Court cannot assume that it has a different meaning in the will, as the jury have not

(*a*) 2 *Jurist*, 886.

(*b*) 1 *Show.* 31. 83. *S. C.* 1 *Salk.* 386.; 3 *Mod.* 221. And see the references, pp. 512, 513, post.

found the fact. The general principle (*Lord Braybrooke* v. *Inskip* (*a*), *Roe dem. Reade* v. *Reade* (*b*)) is, that general words will pass the estate of a bare trustee, unless there is something to shew a contrary intention, and that a contrary intention will be presumed from any charge or condition inconsistent with the trust, because the Court will not presume an intention to do what cannot legally be done. But this rule applies only to cases of express, not of constructive, trusts; *Wall* v. *Bright* (*c*). The distinction between express and constructive trusts was made in *Goodwyn* v. *Lister* (*d*), on an application to a Court of equity to order an infant trustee to convey under stat. 7 *Ann. c.* 19.; and in *King* v. *Turner* (*e*), on a similar application under stat. 6 *G.* 4. *c.* 74. If the rule is carried beyond express trusts, or such as appear on the face of the deed conveying the estate to the testator, before a Court of law can determine whether the legal estate passes to a devisee, the collateral issue, whether the testator be a bare trustee, must be determined; and this can properly be done only by a suit in equity. A Court of law may, indeed, look at trusts expressed, or necessarily resulting from facts stated, in the deed under which the testator takes, in order to determine his intention; but it cannot go beyond the deed for evidence of a trust on which the devise of the legal estate is to depend. Even in cases of express trusts, the rule has not been uniformly observed; *Ex parte Shaw* (*g*). The question here is, whether, if a testator devises land by name, a part of which he had contracted to sell, that part will not pass to the devisee if

(*a*) 8 *Ves.* 417. 435.
(*b*) 8 *T. R.* 118.
(*c*) 1 *Jac. & W.* 494.
(*d*) 3 *P. Wms.* 387.
(*e*) 2 *Sim.* 545. 549.
(*g*) 8 *Sim.* 159.

charged with the payment of his debts: and no case has gone so far as to decide that it will not. If a presumption arises out of the charge one way, a contrary presumption arises from the fact that his heir was an infant, who could not complete the sale without a suit in equity (*Wall* v. *Bright* (*a*)) the costs of which would be paid out of the testator's estate (*Midland Counties Railway Company* v. *Westcomb* (*b*)); and also from the multiplication of heriots by the severance of the copyhold. But, if conflicting presumptions arise, the Court cannot estimate the relative weights, and no inference as to intention can be drawn to negative the express words.

But, if the devisee takes nothing in the land in question, then the case depends on the interpretation of the word "forfeit" in stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9. This enactment does not take away the lord's common law remedy of seizing the land of an infant till he comes to be admitted, but merely saves from absolute or total forfeiture. *Blackstone* (2 *Com.* 267.) defines forfeiture as a loss of *all* interest in lands. In *King* v. *Dilliston* (*c*), though the Judges differed in their decisions, and as to the grounds of them, all agreed that the words "seize as forfeited" could not be construed as seizing quousque. In *Underhill* v. *Kelsey* (*d*) it was held that, where the heir is beyond seas, the lord cannot seize "as forfeited," but may "seize in the interim." The interpretation of the words in stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9. must be the same as that of the same words in the corresponding clause of sect. 5 of stat. 9 *G.* 1. *c.* 29., repealed by the later act for the purpose of re-

(*a*) 1 *Jac. & W.* 494. See p. 504. (*b*) 11 *Sim.* 57.
(*c*) 1 *Show.* 31. 83. *S. C.* 1 *Salk.* 386.; 3 *Mod.* 221.
(*d*) *Cro. Jac.* 226.

enactment and consolidation. Now, under sect. 1 of that act, it was held, in *Lord Kensington* v. *Mansell* (*a*), that the lord was not empowered to admit any person entitled otherwise than by descent or devise: and, if sect. 5 of stat. 9 *G.* 1. *c.* 29. took away the lord's power to enter quousque, he would have no remedy either by statute or common law in the case of an infant or feme covert entitled by deed. The preamble of stat. 9 *G.* 1. *c.* 29. represents that the statute is in aid of the lord; and it is so, if it gives him the option of an additional remedy: but, if it takes away the common law remedy, it imposes on him great difficulty. The lord is impeded in enforcing his fine, because admittance is useless to the heir, and seldom thought worth the fine of two years' value to any one. When the tenancy is vacant, and no claimant appears, if it be held that he cannot seize quousque, but must proceed by admitting under the statute, he can enforce his fine only by ejectment, which would be defeated by shewing the heir to be under disability. If he then admits the heir, and, on nonpayment of the fine, brings a second ejectment, he may be again defeated by proof of title in a devisee, because the statute empowers him to admit only persons entitled. And, if he admits the devisee, he may be again defeated by proof of title by deed of appointment previous to the devise. In all these actions he would be embarrassed by the necessity of proving the title of him whom he seeks to eject; and the defendant would succeed by proving that he never had title to the land which he seeks to retain; and the lord could discover the title to the land only by successive trials and defeats, or by bill of discovery. But, if the lord has

(*a*) 13 *Ves.* 240.

the option of the statutory or the common law remedy, these difficulties do not arise; because, first, the lord will proceed by statute only when he knows who is entitled; and, secondly, because, if his ejectment fails under the statute, he may succeed on his common law right of entry for nonpayment of fine. Another anomaly would result if this were not so. Sect. 9 of stat. 11 *G.* 4. & 1 *W.* 4. *c.* 65. declares that there shall be no forfeiture for nonappearance to be admitted, or nonpayment of fine after admittance; and the statute (sect. 6) gives the lord, in the latter case, the remedy of entering and holding till the fine is satisfied. If, then, the clause against forfeiture restrains the lord from entering till the heir appears, it must be held that the lord's entry till the heir pays the fine is not forfeiture, but that his entry till the heir claims admittance is a forfeiture. The word "forfeit" must mean the same in each case, and cannot, in the case of nonpayment of fine, be construed inconsistently with the remedy given to the lord in that case. The duration of the lord's tenure, when he enters pro defectu tenentis, is not greater than when he enters under the statute for nonpayment of fine; nor is the condition on which the claimant may determine it more onerous: and, as the entry under the statute cannot without inconsistency be called a forfeiture, so neither can the entry quousque at common law.

The Court below seem to have been pressed with the difficulty, that the construction insisted upon for the plaintiff leaves no operation for sect. 9, except in the rare and doubtful case of a particular custom for absolute forfeiture binding on infants. But the section would apply also to the case of femes covert, who by common

law were not exempted from forfeiture, as appears from *Gilbert's Tenures*, 231., which is cited in 1 *Scriv. Cop.* 288. note (*i*), (4th ed.), and was a book of authority at the time of the passing of stat. 9 *G.* 1. *c.* 29., the author being then a Baron of the Exchequer. He assigns, as the reason for his opinion, that femes covert were bound by fine and nonclaim till the privilege of exemption was given them by stat. 4 *H.* 7. *c.* 24., and that the case of nonclaim of copyholds must follow the analogy of common law in the former case. And, immediately after his elevation to the English Bench (*a*), the anomaly pointed out was corrected by statute. Sect. 9 of stat. 11 *G.* 4. & 1 *W.* 4. *c.* 65. might also be intended to provide that the direction in sect. 3, that the infant "shall come" to be admitted, should not, if disobeyed, work a forfeiture. In the judgment below it is said that there is no decided case on this subject. There are, however, two, not cited below, one of which was not reported when that judgment was given. About ten years after the passing of stat. 9 *G.* 1. *c.* 29., in *North* v. *Earl of Strafford* (*b*), the Countess of *Strafford*, being admitted by attorney, refused to pay the fine, on the ground that the attorney had no authority to bind her; and the lord sought relief in equity: but Lord Chancellor *King* said he had a remedy at law; either he might bring an action for his fine, if the admittance was valid, or, if not, he might "seize the copyhold as forfeited:" the words "as forfeited" may be inaccurate; but the decision cannot have been mistaken, and is an express authority. In *Doe dem. Tarrant* v. *Hellier* (*c*), cited below, it was taken for granted that a seizure, where a feme covert was entitled, would

(*a*) See Memorandum, 11 *Mod.* 376. (*b*) 3 *P. Wms.* 148.
(*c*) 3 *T. R.* 162.

have been good, if it had not been for an absolute forfeiture. In *Doe dem. Bover* v. *Trueman* (*a*) the Court clearly so understood the decision in *Doe dem. Tarrant* v. *Hellier* (*b*), and drew a distinction between a seizure quousque and a forfeiture, as the preliminary steps in the former case, begun by one lord, might be continued by his successor, but not so in the latter case. *Doe dem. Twining* v. *Muscott* (*c*), decided after the argument and before the judgment in the Queen's Bench, is an express determination on the point, contrary to that of the Court below.

Kelly, contrà. The important point, which has not yet been decided, is, whatever the nature of the Company's interest may be, whether *Skidmore* died seised: for, if he did not, this action is not maintainable; and, if, notwithstanding his conveyance to the Company, he did, the act, 33 *G.* 3. *c.* 80., establishing the Company, must, as to such transactions, be considered a nullity. [*Pollock* C. B. The legislature could never have intended the Company to take only an equitable interest.] Whatever the position of the lord may be, or his right to compensation, the question is, whether the Company did not take all the interest which *Skidmore* possessed, in law or equity. If they did, *Skidmore* could not die seised. But the lord's right to seize quousque depends on the tenant's dying seised. [*Rolfe* B. The right of the lord to enter does not depend upon the tenant dying seised: if a copyholder aliened by feoffment and livery, it would be a forfeiture; yet the lord could enter quousque on his death.] The proclamations in this case state that the tenant died seised: and this is always the

(*a*) 1 *B. & Ad.* 736. 745. (*b*) 3 *T. R.* 162.
(*c*) 12 *M. & W.* 832.

case; *Doe dem. Tarrant* v. *Hellier* (*a*), *Doe dem. Bover* v. *Trueman* (*b*). The decision in the action of ejectment turned entirely on another point, which might perhaps have been met: but the Company were obliged to proceed in Chancery, in order that the canal might not be stopped (*c*), and to assume in those proceedings the validity of the judgment. [*Pollock* C. B. You find authority in the act to enter on land and give compensation.] That is so: but the plaintiff must shew, not only title to compensation, but that there is nothing in the Company's acts to give them the power to take copyhold land at all. It is true that *Skidmore* could not convey the lord's interest; but he did convey his own: if so, he did not die seised. [*Pollock* C. B. It cannot be said that the interests of lords of manors were not contemplated; for sect. 101 mentions them.] The question is whether, by stat. 33 *G.* 3. *c.* 80. *s.* 9., under the conveyance by *Skidmore*, all his interest passed to the Company. They could do nothing without the legal estate. *Skidmore* was seised in fee, according to the custom of the manor, and conveyed to the Company by a form which passes all that he had, including the right of possession. If the Company had had a conveyance in the same form from the lord also, they would have acquired the fee: how much then would they have derived from each? As no distinction is made, respecting the form of conveyance, between copyholds and freeholds, they must take under this if at all. There is indeed no conveyance by the lord: and the lord's interest may not pass. [*Rolfe* B. Can you shew any means which the lord

(*a*) 3 *T. R.* 162. (*b*) 1 *B. & Ad.* 736.
(*c*) Antè, p. 488. 2 *Jurist*, 1077.

has of getting compensation for what he would lose by your construction of the act?] He would have a remedy in a court of equity; or, under sects. 10 to 16 of stat. 33 *G.* 3. *c.* 80., he may have a mandamus to the Company to summon a jury to assess the damages. The Company are not limited as to time by their statutes: but the party seeking compensation should take the first step. The tenant is the only person who can give possession; and how can the lord deprive the Company of that possession? [*Parke* B. If he cannot, the lord is deprived of the benefit of an admittance. *Pollock* C. B. According to the provisions usual in modern statutes, possession cannot be taken till payment of compensation. *Smythies.* It is so in this.] Unless the lord can maintain ejectment, he cannot succeed in this action. But the tenant's conveyance gave the right of possession to the Company, and took away the lord's right to seize quousque, which was commuted into a right to compensation. [*Pollock* C. B. The act intending that the form given should be the only conveyance between the parties, it might possibly have the effect of an admittance as well as of a surrender. *Parke* B. Is there any clause to compel the Company to purchase of the lord, or to enable the lord to ask for a mandamus to enforce compensation?] The lord cannot compel the Company to buy his interest in the land; but he can compel them to give him compensation for any injuries to lands or any interest in lands. [*Maule* J. The act says that the lands must be affected, not the interest in them.] He may have compensation for every kind of injury, including that which arises from the transfer of possession to a corporation, whose perpetuity deprives him of fines; *ss.* 10, 11, 15, 16, 30. Sect. 103

shews that the lord must lose his manorial rights, acquiring a right to compensation. When waste lands are taken, the lord's consent is required; but for copyhold lands the consent of the owners is sufficient. *Regina* v. *The Eastern Counties Railway Company* (*a*) shews that clauses for compensation are very liberally construed in favour of the landowner.

But, supposing that *Skidmore* did die seised, his heir was entitled to be admitted, and was an infant protected by stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65., under which statute the lord ought to have proceeded, and not by seizure at common law. The devisees under *Skidmore*'s will are not entitled to admittance, as nothing passed under the will but that to which he was beneficially entitled. The testator, by directing the payment of his debts in the first place, and then proceeding to devise his lands, impliedly charges his lands with the payment: he also directs his devisees to apply the rents for the benefit of his family. These directions are inconsistent with an intention to pass a bare trust estate; *Galliers* v. *Moss* (*b*), *Doe dem. Roylance* v. *Lightfoot* (*c*), *Wall* v. *Bright* (*d*) *Roe dem. Reade* v. *Reade* (*e*), *Right dem. Compton* v. *Compton* (*g*). It is said that this rule does not extend to implied trusts: but what principle can there be for the distinction between these and express trusts? [*Maule* J. A devisor might be impliedly a trustee without knowing it: he might think himself owner.] Though in the cases cited, of *Goodwyn* v. *Lister* (*h*) and *King* v. *Turner* (*i*), the Court would not summarily compel an infant trustee

(*a*) 2 *Q. B.* 847.
(*b*) 9 *B. & C.* 267.
(*c*) 8 *M. & W.* 553.
(*d*) 1 *Jac. & W.* 494.
(*e*) 8 *T. R.* 118.
(*g*) 9 *East*, 267. 273.
(*h*) 3 *P. Wms.* 387.
(*i*) 2 *Sim.* 549.

by implication to convey, yet this is no authority for the construction of a will, where the only questions are the intention and the capacity of the words to effect it. In *Lindsell* v. *Thacker* (*a*) the testator, who devised to his wife for her sole use, was the vendor of a copyhold which he held as trustee, as here; and the estate did not pass by the will.

But, if the estate did pass by the will, the devisees have disclaimed, and the legal estate remains in the heir at law; *Rex* v. *Wilson* (*b*). *Doe dem. Le Keux* v. *Harrison* (*c*) shews that nothing vests in a devisee of copyhold till admittance. Then, assuming that the estate either did not pass by the will or has been disclaimed, the heir being an infant, the lord was restrained from seizing the land quousque by stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9. From the title and recital of stat. 9 *G.* 1. *c.* 29. it appears that the intention of the legislature was to enable the lord immediately to obtain his fine, and to protect the tenant from losing more than the fine; the remedy given by statute being substituted for all other proceedings. The holding of the lord till the heir claims, without accounting for the profits, is a forfeiture in effect; and the term "forfeiture" is used with that meaning in 1 *Watk. Cop.* 330. A custom for infants to forfeit absolutely for not coming in, though alluded to in *Doe dem. Tarrant* v. *Hellier* (*d*), is so rare, if it exists at all, that the statute must have been intended to apply to some more general case. As to the cases cited on the other side: in *Doe dem. Twining* v. *Muscott* (*e*) the construction of

(*a*) 12 *Sim.* 178. There appears to be an erratum in the marginal note.
(*b*) 10 *B. & C.* 80.
(*c*) 6 *Q. B.* 631.
(*d*) 3 *T. R.* 162.
(*e*) 12 *M. & W.* 832.

the statute rests only on a dictum: the case was argued and decided on other points. In *North* v. *Earl of Strafford* (*a*) the statute is not mentioned, and seems to have been overlooked. *Clayton* v. *Cookes* (*b*) contains a dictum adverse to the suggestion that a lord may seize. In *Doe dem. Tarrant* v. *Hellier* (*c*) the point was argued, but not decided.

But, further, the warrant in this case was to seize absolutely; and the verdict finds that the seizure was under that warrant, by reading it on the land, &c. And, although the jury find that the seizure was only quousque, this will not help, as it appears that the bailiff had no authority for such a seizure. The seizure, then, being absolute, cannot be supported as a seizure quousque: *Doe dem. Tarrant* v. *Hellier* (*c*).

Again, the custom of the manor, which must be strictly pursued, is stated to be to make three proclamations at three consecutive general Courts Baron next after the tenant's death: but the verdict does not state that the Courts were next after the tenant's death, or consecutive, or that the second was general. In *Doe dem. Bover* v. *Trueman* (*d*) the Court of King's Bench held that, by the general law of copyhold, the three proclamations ought to be at consecutive courts.

Smythies, in reply. As to the last technical objections, the verdict states that the proclamations in this manor were "usually" made at the three general Courts Baron next following the tenant's death: but, as that which is usual is not universal, this does not import a binding custom. And, though the case cited

(*a*) 3 *P. Wms.* 148.
(*b*) 2 *Atk.* 449.
(*c*) 3 *T. R.* 162.
(*d*) 1 *B. & Ad.* 736.

shews that, without any special custom, the Courts must be consecutive, yet the present case differs, in not stating that there were intermediate courts; and the onus of proving that lay on the defendants. For, if no proclamations had been proved, the judgment in ejectment, which in this action for mesne profits would have been conclusive if pleaded, was, when proved, primâ facie sufficient for the plaintiff's case. Even where it has been requisite that the proclamations should be proved, an allegation like the present finding, that they were made at three Courts, without express averment that the Courts were consecutive, has been considered sufficient, as in the special verdict in *King* v. *Dilliston* (*a*), the special case in *Doe dem. Tarrant* v. *Hellier* (*b*), and the rejoinder in *Sir R. Lechford's Case* (*c*), where there was a demurrer to the surrejoinder; in none of which cases was the objection raised. Then, as to the objection that the second Court is called simply a "Court Baron," omitting the word "general," the word omitted is superfluous and adds nothing to the meaning, the term "Court Baron" importing a general Court (2 *Scriv. Cop.* 600, note (*a*)), unless restrained by the term "special." Moreover, as every Court held with the customary public notice is general, and such notice is here stated, the fact that the Court was general sufficiently appears. Further, if the devisees under *Skidmore*'s will are entitled, the proclamations were dispensed with by the presence of one of them

(*a*) 1 *Show.* 31. 83. *S. C.* 1 *Salk.* 386.; 3 *Mod.* 221.

(*b*) 3 *T. R.* 162.

(*c*) 8 *Rep.* 99 *a.* The rejoinder alleged that three proclamations were made "according to the custom," which, as pleaded, required proclamation in Court, and "at two other Courts following."

in Court; 1 *Scriv. Cop.* 286; 1 *Watk. Cop.* 239; *Doe dem. Bover* v. *Trueman* (*a*): and his not asking to be admitted at that time does not amount to a disclaimer.

Then, as to the seizure quousque not being authorized by the warrant, which was to seize absolutely, no warrant was necessary; 1 *Scriv. Cop.* 288. citing *Trotter* v. *Blake* (*b*); *Milfax* v. *Baker* (*c*). The decision in *Doe dem. Tarrant* v. *Hellier* (*d*) did not turn on the warrant, but on the subsequent act of the lord proving an intention to seize absolutely; without this, the warrant would not have proved that the seizure was absolute. But the jury here find expressly that the seizure was quousque; and this conclusion of fact cannot be controuled by the absence of evidence to support it, a special verdict not professing to set out evidence.

On the construction of stat. 33 *G.* 3. *c.* 80. *s.* 9., the question is, whether the parliamentary conveyance operates as an admittance as well as a surrender. Two forms are given, one for a conveyance to the Company, and the other for a conveyance to individuals: and, the same efficacy being given by the statute to each, an admittance is included in both cases or neither. But it is clear that in the case of an individual there is no provision for any compensation to the lord; and it seems to be conceded that his interest could not have been intended to pass without compensation. The clauses relied on for the defendants, as giving compensation, apply only to physical injuries to the land, for which an action on the case might be brought, not to the conveyance of any estate in the land: and the claim in respect

(*a*) 1 *B. & Ad.* 747.
(*b*) 2 *Mod.* 229.
(*c*) 1 *Lev.* 26.
(*d*) 3 *T. R.* 162.

of these must, by sect. 21, be made in six months; a reasonable provision for visible injuries, but not applicable to a secret destruction of the lord's interest. Stat. 41 *G.* 3. *c.* lxxi. *s.* 7. enacts that all future purchases of copyhold, to be made under the former acts (which property must be conveyed by the form given in stat. 33 *G.* 3. *c.* 80. *s.* 9.), "shall be executed and completed by surrender thereof," &c.; and the lands "shall continue subject to the same" fines; thus assuming that a conveyance by the form in question is incomplete without surrender and admittance, and that fines are still payable. But sect. 25 of stat. 33 *G.* 3. *c.* 80. requires, in addition to a conveyance, payment before the Company enter on the land: it is not contended here that the lord has been paid; and the nonpayment alone will support the present action; *Earl of Harborough* v. *Shardlow* (*a*). If the construction of the act be doubtful, the Company who obtain it must suffer by the ambiguity; *Scales* v. *Pickering* (*b*), *Webb* v. *The Manchester and Leeds Railway Company* (*c*). Assuming that the tenant did convey the legal estate in the land, so that he did not die seised, the consequence contended for on the other side, that the lord cannot enter, does not follow; for the lord enters for want of a tenant, whether the tenancy has become vacant by death or by alienation.

As to the cases which have been cited as shewing that nothing passed to *Skidmore*'s devisees. In *Galliers* v. *Moss* (*d*) and *Doe dem. Roylance* v. *Lightfoot* (*e*) the testators were mortgagees: and it appeared that they

(*a*) 7 *M.* & *W.* 87.
(*b*) 4 *Bing.* 448. 452.
(*c*) 4 *Myl.* & *Cr.* 116. 120.
(*d*) 9 *B.* & *C.* 267.
(*e*) 8 *M.* & *W.* 553.

were trustees for the mortgagors on the face of the deeds creating their estates: whereas in this case the fact of trusteeship is to be deduced from the principles of equity applied to the evidence, a distinction recognized in *Wall* v. *Bright* (*a*). In *Lindsell* v. *Thacker* (*b*) it was admitted on the pleadings that the testator was a bare trustee: but here the fact is in issue, and must be decided as in a suit in equity, and cannot be established by the mere inspection of deeds or of the pleadings. The Court cannot apply the rule contended for without first deciding that which is the proper subject of a suit in equity. The consequence of a testator's permitting an estate which he has contracted to sell to descend on his infant heir, who cannot convey without a suit in equity, has already been pointed out: it cannot be presumed that the testator here meant to subject his estate to the costs of such a suit.

As to the construction of stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. *s.* 9., an expression in 1 *Watk. Cop.* 330 has been cited with reference to the word "forfeiture:" but *Watkins*'s opinion and that of Mr. Serjt. *Scriven*, on the whole point at issue, are with the plaintiff; 1 *Watk. Cop.* 235, note (1), 1 *Scriv. Cop.* 341.

Cur. adv. vult.

TINDAL C. J., in this vacation (*June* 13th 1846), delivered the judgment of the Court. After stating the material parts of the special verdict, his Lordship proceeded as follows.

On the argument of this case, by Mr. *Smythies* for the plaintiff in error, and the Solicitor General (*c*) for the defendants, all the questions arising in it were fully

(*a*) 1 *Jac. & W.* 494. (*b*) 12 *Sim.* 178.
(*c*) Sir *Fitzroy Kelly*.

and elaborately discussed. We have considered them, and are of opinion that the plaintiff in error is entitled to judgment.

The principal question was as to the effect of the conveyance executed by *Joseph Skidmore*, in the form given by stat. 33 *G.* 3. *c.* 80. *s.* 9.; by which he granted and released all *his* right, title and interest to the Company, for a sum of money paid to him. It was contended, on the part of the Company, that the effect was to transfer all *Skidmore*'s interest to the Company, so that he was no longer tenant to the lord, and therefore did not die seised of the tenement at the will of the lord, according to the custom of the manor: that the lord's title is barred: and that, for the loss of the benefit derived from it, his only remedy was by applying for a compensation under the act: and, at all events, if his title continued, he could not seize *quousque* for the default of his infant tenant in not coming to be admitted. The counsel for the plaintiff, on the other hand, insisted that the effect of the statutory conveyance was only to transfer such interest as the tenant himself could transfer without the concurrence of the lord: that it operated in the nature of a surrender: that, until the admittance of a new tenant, the old one continued seised: that the lord was not bound to accept a corporation as his tenant, for he would be deprived of the fruits of his seignory: and, consequently, that he could proceed, on the death of the tenant *Skidmore*, in the usual way, to compel his heir or devisee to be admitted, and, he not appearing, to seize quousque, though the tenant was an infant: and that he could, after seizure, maintain his ejectment, and was not bound, or indeed entitled, to claim compensation under the act.

And we think that the conveyance of the tenant transfers all that the tenant could transfer without the lord, but *no more*, the lord's title remaining as before.

It was probably by an oversight that the framers of the act did not expressly include copyholds, and provide for the interest of the lord. In a subsequent statute, 41 *G.* 3. *c.* lxxi., the legislature has done so; and a similar provision has been made in various railway acts and others mentioned on the argument (*a*). But we think sufficient appears, in this act, to include every species of title and tenure, and have no doubt but that the lord would have been bound, and the title of the Company complete, if he and the copyhold tenant in fee had joined in, or each separately made, a conveyance in the statutable form. But, if the tenant makes a conveyance without the lord, it is impossible that he can be considered as representing the lord, or that the lord's right could be thereby transferred.

The 30th section of stat. 33 *G.* 3. *c.* 80., upon which reliance was placed, directs the commissioners to settle the shares of purchase money, or compensation for damages, to be allowed to persons having a particular estate, for their interest, with a due *regard to the rights* and interests of the lord *of the manor*. This section may be meant to apply to cases where the lord joins in the conveyance: at all events the clause is too uncertain to take away his right: and it is to be recollected that it is the Company which is to suffer by the vagueness and obscurity of their act.

(a) It has not been thought necessary to mention these in the report.

On the argument, upon a motion in the Court of Queen's Bench, for a new trial in the ejectment (*a*), the late Mr. Justice *Littledale* and my brothers *Patteson* and *Williams* were all of opinion, as appears by a MS. report with which we have been furnished, that the conveyance by the tenant did not affect the lord's rights, and could not possibly operate as a parliamentary enfranchisement: and they directed the verdict to be entered for the plaintiff. It is to be observed that in the report of their judgment not the least notice is taken of the objection to the plaintiff's recovery, which has been so strongly pressed on argument before us, that the lord could not sue because he was to receive compensation under the act for the injury to his seigniory; and therefore it is to be inferred that that point had not been insisted upon by the defendants' counsel (*b*). And the view of the case taken by the Court of Queen's Bench was confirmed by the Vice Chancellor of *England* (*c*), who held that "the effect of the bargain and sale was not to convey the legal copyhold estate; but, being a conveyance for valuable consideration, the tenant of the estate became trustee of the copyhold for the Company:" and the Lord Chancellor *Cottenham*, on appeal (*d*), confirmed this opinion; for he said that the Court of Queen's Bench had decided that the conveyance did not affect the interest of the lord, and that it never occurred to him to dispute the judgment of that

(*a*) See p. 518, note (*a*) at the end of this case.

(*b*) It was suggested at the bar that the copyholder might be considered as selling for the lord as well as himself, and that the compensation might be afterwards apportionable between them, subject to adjustment by the commissioners in case of dispute.

(*c*) *Grand Junction Canal Company* v. *Dimes and Skidmore*, 2 *Jurist*, 886.

(*d*) *Grand Junction Canal Company* v. *Dimes*, 2 *Jurist*, 1077.

Court. "The act of parliament," his Lordship observed, "authorizes the copyhold tenant to release his right to the Company; and the act says, that they shall have the same interest that he had. They, therefore, should have a tenancy during the life of the copyhold tenant, and then the lord would enter for want of a tenant." We think, therefore, that no interest passed to the Company except what the tenant could convey. They chose to rest contented, as they had a right to do, with the title of the copyhold tenant, and not to purchase that of the lord. The consequence is, that they are in a similar situation to that in which they would have been placed if they had chosen to purchase a long term of years from a termor, and leave the reversion in fee outstanding. The reversioner, when the term expired, would have a right to treat the Company, if by its officers it occupied his land, as trespassers; and they would be so, until they paid the purchase money (see sect. 25 of stat. 33 *G.* 3. *c.* 80.); and the lord might bring ejectment. So said Lord *Ellenborough* where a canal company took land limited to one for life, without paying the value of the land or a compensation, and the remainder man applied for a mandamus; *Rex* v. *Stainforth and Keadby Canal Company* (*a*). And, in like manner, whenever the legal right of the lord of the manor to possession of the tenement begins, the land becomes his estate; and, when he has taken possession, the Company are trespassers, unless they choose to purchase what is now the land of the lord.

Upon referring to the material clauses of the act, the 5th (*b*), 16th, 17th, 21st, 24th and 25th, it appears to

(*a*) 1 *M.* & *S.* 33.

(*b*) Probably 9th was meant.

us that the Company are *enabled*, not *bound*, to purchase or acquire the right of making the canal on the lands specified in the act: if they choose to do so, they are to pay the price or recompense for the use of the land, agreed or assessed by the commissioners or a jury; and that, before they enter on the land; if they decline, the rights of the landowners remain as before. And, as to damages, those necessarily resulting from the making of the canal, as damages by severance, are to be paid in the same way as the purchase money for the land; those arising to the adjacent lands, mills, &c., from the making or maintaining or repairing the canal or its feeders or reservoirs, or the exercise of similar powers, by the oozing of water from the canal, or by the obstruction of watercourses, &c., must be separately assessed and paid, and must be claimed in six months. But the provision for compensation for damage is only such as is caused *to the land itself* by the making or maintaining of the canal: and there is no compensation given for injury to tenure; nor does the making of the canal in the least injure that. The rights of the lord and the fruits of the tenure remain after the making of the canal exactly the same as before, if the copyholder's conveyance did not affect the lord's interest; if it did, that *conveyance* would have injured the lord's manorial rights, not the making of the canal. But, as the lord's rights did not pass, they remain as before: and, as soon as his title to the land itself arises, by forfeiture or otherwise, and he gains possession, he is precisely in the same position as a landowner whose land the Company have not agreed to purchase or take.

It appears to us, therefore, that the Court of Queen's Bench took a proper view of this part of the case. The

lord retained his right, because he had never been called upon to sell, and never sold it: and the tenant had no power by the act (and it would have been singular if he had) to sell it for him: and this is not a case for compensation by way of damages.

The Solicitor General then insisted that, if the Company had acquired no legal right by the conveyance to them, the plaintiff had still no right to enter pro defectu tenentis, for several reasons.

First, because the tenant's heir was an infant at the death of the tenant, and the lord's right to enter and seize quousque was taken away by stat. 11 *G.* 4. & 1 *W.* 4. *c.* 65. This statute (which repeals and re-enacts stat. 9 *G.* 1. *c.* 29.) provides, by sect. 9, that no infant or feme covert shall *forfeit* any copyhold land for the neglect or refusal to be admitted or pay a fine on admittance. And that a seizure quousque, by which the lord obtained the profits until the infant came in, was a *forfeiture* within this enactment. And of this opinion was the Court of Queen's Bench, who, deciding with the plaintiff on the ground that his title was not barred by the canal acts, gave judgment (*a*) against him upon the construction of this section.

A short time before this, the Court of Exchequer had given a different judgment in the case of *Doe dem. Twining* v. *Muscott* (*b*), with respect to a feme covert, and held that the word "forfeit" in this clause was to be construed in its proper sense, and did not exclude the right of the lord to seize quousque. But this case was not reported at the time of the argument in the Court of Queen's Bench, and was not cited. We have now to

(*a*) Antè, p. 485. (*b*) 12 *M.* & *W.* 843.

decide which of these two constructions of the statute is correct, as we all agree in thinking that the infant heir took the legal estate, and not the devisee under *Skidmore*'s will.

Prior to these cases, there was no decision of a court of law on this question. There was an authority of a court of equity, not long after the passing of stat. 9 *G.* 1. *c.* 29. (containing a similar clause). Lord Chancellor *King*, in the case of *North* v. *Earl of Strafford* (*a*), held that, if a *feme covert* would not come to be admitted, the plaintiff *might enter and seize;* though he is reported to have decided that he might *seize as forfeited*, which, in the proper sense of that word, is inaccurate; and on that ground held a demurrer to a bill against a husband and wife for the recovery of a fine on admittance to be good. It is said that Lord *King* did not refer to the statute: but it can hardly be supposed that he was not aware of its provisions. The case of *Doe dem. Tarrant* v. *Hellier* (*b*) was mentioned as an authority: but, though the point was argued, the Court decided the case upon other grounds.

In this state of the authorities, with opposing decisions of two Courts, we are to consider which is right. And, though this point is by no means free from doubt, it appears to us that the reasons against that of the Court of Queen's Bench ought to prevail.

The term "forfeiture," primâ facie, means the loss of the estate; the loss of the profits quousque is not properly a "forfeiture," as is explained by Mr. Justice *Bayley* in delivering the judgment of the Court of King's Bench in *Doe dem. Bover* v. *Trueman* (*c*). He

(*a*) 3 *P. Wms.* 148. (*b*) 3 *T. R.* 162.
(*c*) 1 *B. & Ad.* 746.

says that it is not to be so considered, but is rather in the nature of process at the instance of the lord, and by way of cape or distringas to compel appearance by the heir, than a forfeiture; and therefore the Court held that a succeeding lord could avail himself of it, which he could not if it was a *forfeiture*, properly so called. And *Watkins, On Copyholds*, tit. *Admission*, vol. i. p. 230, treats the power of seizure as arising from the right of the lord to resume the possession, on the death of the ancestor, of the lands which returned to him and might become the subject of a new grant. And it is clearly a right not arising from special custom, but legally incident to every manor. The lord may seize quousque, "without custom, but to seize as *forfeited*, he could not without a custom;" *Earl of Salisbury's Case* (*a*). The opinion of the Court of Queen's Bench proceeds upon the supposition that at common law this right of the lord existed when the heir was an infant, and that of the Court of Exchequer upon the assumption that it did so when the heir was a feme covert, independently of any special custom: and, we think, correctly.

In *King* v. *Dilliston*, reported in many books, the special verdict, which is set out in 1 *Lutw.* 766., states a custom, if the surrenderee does not appear, for the steward, by the bailiff, to seize into the hands of the lord, but does not state expressly that the lands were *forfeited*. On the writ of error, three judges against Lord *Holt* affirmed the judgment of the Court of Common Pleas, that the custom did not bind an infant. According to the report in 1 *Show.* 83., Lord Chief Justice *Holt* treated the right of seizure quousque

(*a*) 1 *Lev.* 63.

against a person under disability as a matter agreed upon by all the judges in the case of *Underhill* v. *Kelsey* (*a*); and, according to *Carthew*, 45, as a clear proposition. He states, in the report in *Shower*, that the reason of the law taking care of infants was to preserve the *inheritance*, not the *profits*; and he likens it to the case of an infant tenant by knight service, where the lord takes the profits as guardian. And, according to the report in 1 *Show.* 83 and 3 *Mod.* 221, *Eyres*, and, according to that in 1 *Salkeld*, 386, all the three puisne judges, treat that case as distinct, because on the special verdict it must be considered as a permanent, not a temporary, seizure, and therefore could not bind the infant. In the report in *Comberbach*, p. 118, of the first argument, it is said that *Dolben* J. said it would have perhaps been otherwise if the special verdict had found a seizure merely, and that "*Holt*, *North* and others, five great lawyers, were for a seizure quousque in such a case." In the leading case on this subject of forfeiture by custom, *Sir R. Lechford's Case* (*b*), it is stated that no custom by the law can *bar* those who by judgment of law are not bound to make claim, viz. persons beyond seas, infants, persons of non-sane memory, and in prison.

Upon these authorities (and there are none to the contrary, except a doubt thrown out not very intelligibly by *Gregory* J. in the report in 3 *Mod.* 224.), we think that at common law the lord might seize quousque in the case of an infant and other persons under disability: and there never was any doubt as to the right in the case of a feme covert; 8 *Rep.* 100 *b.*

(*a*) *Cro. Jac.* 226. (*b*) 8 *Rep.* 99 *a*, 100 *b.*

The only question, therefore, is whether this right is taken away by the statutes 9 *G.* 1. *c.* 29. and 11 *G.* 4. *&* 1 *W.* 4. *c.* 65.

The Court of Queen's Bench held that a *seizure quousque* was included in the term "forfeiture," because otherwise the operation of the statute would be limited to cases where there was a special custom for infants and persons under disability to forfeit; and it could not be conceived that cases of such rare occurrence would be the subject of legislative enactment. Femes covert would have been bound by a general custom of forfeiture, though not named (*Gilb. Ten.* 231., 8 *Rep.* 100 *b*), so that the number of instances would not be so few as supposed. But, admitting that they were, we cannot agree that the smallness of the evil to be remedied, if the words are understood in their strict and proper sense, is a good reason for reading them in another: and the Court of Queen's Bench apparently did not sufficiently advert to the great inconvenience to the lord, so forcibly pointed out on the argument before us, if he should be obliged to act under the provisions of the statute, and to appoint a guardian or an attorney for the infant or other person under disability in all cases. He cannot know the copyholder's title, whether the right to admission is in an heir, devisee or appointee, and who the heir or other person entitled is: the tenant in possession has an interest to conceal the title, and to hold the land: and, if the lord admits the heir by guardian, and brings his ejectment for the fine, he may be turned round by the tenant in possession shewing another to be the true heir, or a will; if he admits the devisee, he may be defeated by evidence of a prior deed of appointment.

It would appear, however, at first sight, to be inconsistent, if the meaning of the statute was to preserve to the lord the right of seizure quousque, under which he would be entitled to all the profits till the heir appeared, that the legislature should give him these special powers by the exercise of which he could not take the *whole* profits, but only to the amount of the fine. This apparent incongruity may, however, be removed by considering that it may be a greater benefit to the lord in some cases to assess a fine at once, because, if after admission the tenant dies, a new tenant would be liable to another fine, and so the lord would gain two fines; whereas, if the tenant died before admittance, he would gain one fine only from his successor: and, besides, if the lord has a limited interest in the manor, as an estate for life, it might be more advantage to him to assess a fine immediately than to seize quousque and take all the profits.

The title of the act, 9 *G.* 1. *c.* 29., from which the act in question is taken, is "to enable the lords more easily to recover their fines," *as well* as "to exempt infants and femes covert from forfeitures." It recites that doubts had arisen concerning the powers of lords of the manor to seize copyholds on the neglect or refusal of persons to come in to be admitted tenants. Therefore, for ascertaining the law and providing a reasonable and proper remedy for lords of manors to compel the admission of their tenants, it provides that infants and femes covert, entitled by descent or surrender to the use of a last will, may appear in their proper persons, or the feme covert by attorney, or infant by guardian, if he has one, otherwise by attorney, which the act gives

them power to appoint, and may be admitted: and it is further provided that, in default, it shall be lawful for the lord to nominate a guardian or attorney, and admit. The title of the act shews that its object was to give a more easy remedy to the lord, not to destroy any remedy he then had. The right of the lord to seize quousque, whether the tenant was under disability or not, can hardly be said to be a matter of doubt. But there had been a doubt as to the forfeiture of infants and other persons under disability entitled to estates when they were surrenderees; for Lord *Holt* differs from the three Judges in *King* v. *Dilliston* (*a*) above referred to: and this may be a doubt intended to be finally settled where the surrender was to the use of a will. Add to this, as the clause in stat. 11 *G.* 4. *&* 1 *W.* 4. *c.* 65. must be construed as the similar clause in stat. 9 *G.* 1. *c.* 29., and the *latter* statute did not extend to infants or femes covert taking under an appointment by deed (*Lord Kensington* v. *Mansell* (*b*)), all right of the lord would be taken away in the case of an infant appointee, if the clause were construed to deprive the lord of the right to seizure quousque, as he could not in such a case appoint a guardian or attorney at all under the provisions of that act.

For these reasons, we think the right of seizure quousque was not taken away by the statute 11 *G.* 4. *&* 1 *W.* 4. *c.* 65.

Two other objections of minor importance still remain to be discussed.

(*a*) 1 *Show.* 31. 83. *S. C.* 1 *Salk.* 386.; 3 *Mod.* 221.
(*b*) 13 *Ves.* 240.

The first, that the warrant of seizure was to seize absolutely, not "quousque." We think, however, this objection cannot prevail. The warrant was unnecessary; *Trotter* v. *Blake* (*a*). And, the bailiff having seized quousque as the agent for the benefit of the lord, the lord might adopt the act, though there was no previous authority, or one more extensive than was necessary for the act done.

The other objection was, that the proclamations were not found to be at three *consecutive general* courts baron. This was first settled to be necessary in the case of *Doe dem. Bover* v. *Trueman* (*b*), above referred to: and, if this had been a special verdict *in ejectment*, and the question whether the lord's title was proved, the verdict would have been defective. But this is an action of trespass for the mesne profits: and the verdict has found a good title, by estoppel, by the judgment in ejectment. That judgment not having been pleaded as an estoppel, the jury were at liberty to find the truth of the fact; and, if they had done so, contrary to the estoppel, and found the proclamation *not* to have been at consecutive courts, or not at general courts baron, according to the custom, the Court must have given judgment without regard to the estoppel; *Com. Dig. Estoppel* (E 10.). But the finding of the jury is *consistent* in all respects with the plaintiff being entitled to recover, and therefore does not affect his right to our judgment. The proclamation may have been at three consecutive general courts baron; for nothing at variance with that supposition is shewn.

(*a*) 2 *Mod.* 229. (*b*) 1 *B. & Ad.* 736.

We think, for these reasons, the judgment ought to be reversed, and judgment given for the plaintiff.

Judgment reversed (*a*).

(*a*) DOE, on the demise of DIMES, *against* The GRAND JUNCTION Canal Company.

[*Thursday, June* 7th, 1838.]

For marginal note, see note in margin of the principal case, second placitum in the Exchequer Chamber.

EJECTMENT for lands in *Hertfordshire*. This cause was tried before Lord *Abinger* C. B. at the *Hertfordshire* Summer assizes, 1836, when the Lord Chief Baron directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. In *Michaelmas* term, 1836, *Thesiger* obtained a rule nisi accordingly.

Sir *J. Campbell*, Attorney General, *Andrews* Serjt. and *Gurney* now shewed cause: and *Thesiger* and *Channell* supported the rule. The material facts of the case may be collected from the special verdict in the action for mesne profits, antè, pp. 470—483.

For the defendants it was argued that, independently of any right acquired by possession and lapse of time, which point was not urged on their part, nor discussed at the bar or on the Bench, the whole interest, including that of the lord, in the land was vested in the Company by the conveyance in 1797, and by virtue of stat. 33 *G.* 3. *c.* 80. The course of argument, and the enactments referred to, will appear sufficiently by the judgments of the Court.

Lord DENMAN C. J., having been absent during the greater part of the argument, delivered no opinion.

LITTLEDALE J. The act of parliament, 33 *G.* 3. *c.* 80., is not very accurately worded, so far as it relates to this point. It may be questionable whether the legislature, in passing it, had lords of manors in their contemplation at all. The only two places in which lords of manors are mentioned are in sect. 30, where it is said that the commissioners are to settle the proportions of purchase money to be paid to the several persons interested, "with due regard to the rights and interests of the lord or lords, lady or ladies, of any manor or manors whereof the lands or hereditaments to be affected by the said canal are respectively holden:" and in sect. 101, which enacts that nothing in the statute shall prejudice the right of any lord &c. of any manor, or of any owner &c., of any lands through which the canal &c. shall pass, to the mines and minerals under such lands, and reserves them to such lord &c. (His Lordship here read sect. 9, for which see p. 471, note (*a*), antè, from "all bodies politic" to "Company of Proprietors.") I doubt very much whether that applies to lords of

manors. It would rather seem to me to be confined to those persons who have the usufruct of the lands, either as actually using them or as receiving the rents. A tenant in tail, for instance, is entitled to be in possession of the property to pasture it with his own cattle and to cultivate it in the usual way; or he may be in the receipt of the rents and profits. But the lord of the manor has only a limited interest: he has an interest in the tenure, and as being entitled to fines, heriots and other services: but he has not an interest reaching to the usufruct, unless in case of forfeiture. For the same reason that the Company had to treat with tenants in tail and tenants for life generally, they had also to treat with persons holding of a manor as such tenants: but I cannot see that the lords of manors are included. The form of conveyance is: I, *A. B.*, in consideration of so much money paid to me by the Company, grant and release to the Company, "all my right, title, and interest, to and in the same, to hold to the Company" &c. It is merely a simple conveyance to be made by *A. B.* to the Company and their successors for ever. If it had been intended to operate as a compulsory enfranchisement, it must be supposed that some addition would have been made. Then in sect. 25 there is a provision that, on payment or tender of the money either agreed on between the parties, or determined and adjusted by the commissioners, or assessed by a jury, it shall be lawful for the Company to enter upon the lands &c.; and thereupon such lands &c., "and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said Company." Now in copyhold lands a man may have the fee simple in point of property but not of tenure. By livery of seisin to himself and his heirs the copyholder is as much seised in fee as a tenant in common socage; but he has not the tenure. And it appears that, under this 25th section, either a whole fee in common socage may be conveyed, or the fee simple of a copyholder may pass leaving the lord of the manor exactly as he was before. Sect. 30 strengthens this conclusion; for it says that the commissioners shall have power to settle what shares and proportions of the purchase money or compensation for damages "shall be allowed to any tenant, or other person or persons, having a particular estate, term, or interest in the premises, for his, her, or their respective interest therein:" but then come these words: "and with due regard to the rights and interests of the lord" &c. of any manor whereof the lands are holden. Here the interest of the lord is treated as an entirely separate matter: and there appears no intention to authorize a compulsory enfranchisement. The act 41 *G.* 3. (U. K.) *c.* lxxi. *s.* 7. expressly enacts that, if the Company want any copyhold estate in future, they are to proceed in a particular way; and provision is made for enfranchisement if desired by the lord, and for securing his fines and services, or compensation for them. I think that that statute has made, as it were, a parliamentary declaration

of the meaning of stat. 33 *G.* 3. *c.* 80. as to the tenure of the lands, and has shewn that, under that act, the lord of a manor was not considered as being bound by the private agreement entered into by the tenant: and I think it would have been very hard that he should be bound by such an agreement, made when he might know nothing about it; though it is true that the statute was public, and the lord might have knowledge that the land was taken. It appears to me that the 9th section provides only for the interest which parties have in the land itself, and does not apply to lords of manors at all; and therefore that the plaintiff has made out his case.

PATTESON J. This case will turn upon the construction of stat. 33 *G.* 3. *c.* 80., because, though some sections of the act of 41 *G.* 3. may throw light upon the case, that act is confined to lands thereafter to be purchased. And the question seems to be, whether the conveyance by the copyhold tenant under the authority of the act is to be taken as a conveyance not only by himself but by the lord. If it is to be deemed a conveyance as for himself and the lord, of course the lord conveys his interest; but the lessor of the plaintiff contends that it is only a statutable conveyance of the copyholder's interest, so as to bind him and all persons claiming under him, but, beyond this, to give the Company only an equitable right. The act, it must be recollected, is an act of parliament obtained by a Company, giving them large powers of taking land, subject to certain limitations, and to conditions as to payment. If, in such an act, there are any mistakes or omissions in consequence of which they have not the benefit they intended to have, or if it is not clearly pointed out how the different objects are to be effected, it is the fault of those who procured the act. The important part seems to be the 9th section: and, looking through it attentively, I do not find any words which apply to a copyhold tenant so as to make him the agent of the lord. The words are: "it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, and feoffees in trust, committees, executors, and administrators, and all other trustees or persons whomsoever:" there is not a word there which can reach this case except "or persons whomsoever." It is made lawful for "all persons whomsoever" to contract and convey, "not only for and on behalf of themselves their heirs" &c., "but also for and on behalf of their cestui que trusts. The copyholder can never be said to be a trustee for the lord. The clause goes on: "and for every other person or persons whomsoever, who is, are, or shall be seised, possessed of, or interested in any lands, grounds, and hereditaments which shall be so set out and ascertained for the purposes aforesaid." The copyholder is a person seised of the lands set out for the purposes aforesaid; but in this part of the clause nothing is said of any other person; the power is for the person himself; so that I can find no

words in this clause which at all point to a copyhold tenant being the agent for the lord in any contract or agreement he can enter into. The words of the statutory form of conveyance do not seem to point at any thing of that kind. (His Lordship here read the form, as set out, antè, p. 472, note (*a*), laying stress upon the words "my right" and "for ever.") The language might raise some difficulty on the point whether such a conveyance would pass the estate of a remainder-man; but it is not necessary to determine that question. Now, if this section does not make the copyholder agent to the lord, it is difficult to say that any other clause of the act can have that effect. Sect. 25 refers to cases where there is payment or legal tender of a sum agreed on, determined or assessed, and where there has been no conveyance, as far as I can understand it; for it says that in the specified cases, or if the person entitled to the money cannot be found or shall refuse to receive it when tendered, it shall be lawful for the Company then, upon investiture in the public funds as is specified in this clause, immediately to enter upon the lands, and thereupon such lands, "and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said Company." That seems to me, in each case, to give the same rights as if there were a regular conveyance under the act: the conveyance would carry it no farther. Then, by sect. 30, the commissioners certainly are empowered to settle what shares of the purchase-money or compensation agreed for, determined and adjusted or assessed in manner aforesaid (which I take to mean agreed for by private agreement, determined and adjusted by the commissioners, or assessed by a jury) shall be allowed to any tenant (whether that means tenant for years in the ordinary sense, I do not know; probably it does) or other person having a particular estate, &c. in the premises, for his interest therein, having due regard to the rights and interests of the lord of the manor. It is said you must construe that to mean that they are to settle what share of the money the lord shall have: certainly it is not so worded: the words are, that they shall be empowered to settle what share of the money shall be allowed to any tenant, or other person having a particular estate, for his interest in the premises; not saying what shall be done with the rest of the money, which of course would go to the other persons interested in the land. What is meant by using the words "with due regard to the rights and interests of the lord" "of any manor," when apportioning the price of the land itself, I do not very well understand. It does not seem necessarily to mean that the lord shall receive any part of that purchase-money; if that was intended, those who procured the act of parliament should have worded it so as to make the intention clear. Under these circumstances, it seems to me that the legal estate in this copyhold land did not pass to the Company, but that *Skidmore* remained the copyhold tenant after the conveyance of 1797.

DIMES v. GRAND JUNCTION Canal Company.

WILLIAMS J. I am satisfied that this was a casus omissus in the act 33 *G.* 3. *c.* 80.; and I am not a little confirmed in that opinion by the introduction of stat. 41 *G.* 3. *c.* lxxi., which I believe to have been intended to supply this omission. I agree with my brother *Patteson* that the principal question arises upon the 9th section of stat. 33 *G.* 3. *c.* 80.: and, considering that section with reference to the power that *Skidmore* had, as connected with the rights of the lord, I should have thought it somewhat extraordinary if, under this act, the copyhold tenant had had power to dispose of the lord's interest. Undoubtedly a distinct and positive enactment would have been required for that purpose. For what relation or connection is there, in point of interest, between the tenant of a manor and the lord? I should think it was putting a force on the 9th section to hold that the tenant might contract for a person with whom he had no union or connection in interest; and that the language could not by any fair reasoning or ordinary interpretation admit of such a construction. The words of the 9th clause are: (His Lordship here read from "It shall be lawful" to "every other person or persons whomsoever"). Now, is it consistent with any intelligible or safe rule of construction, when, up to this time, no mention whatever has been made in the act of lords of manors or of the tenant of any such lord, to hold that under that generality lurks a power to the tenant to represent the lord of a manor in disposing of his interest? Add to that the observation, that the lord and the tenant are as unconnected as possible; whereas in the long recital preceding there is undoubtedly some connection, at least in point of interest, between all the parties enumerated, who are to act and be acted for. It must be remembered that this is the Company's own statute; and they ought to have seen that it was properly framed for their purposes. It appears to me, then, that they have obtained the interest this man was in a condition to part with, but no more; that was their bargain; and consequently he remained the copyhold tenant in point of law; and, he so remaining tenant, upon his death the lord was justified in the course he took to secure for himself a successor in the tenancy. In sect. 30 lords and ladies of manors are introduced nominatim; but there again it would be of all things the most singular that, whereas no mention is made of the loss which the lord may sustain by losing his heriots and fines, but mention is made of a tenant or other person having a particular estate, term, or interest in the premises, who is to receive a proportion of the purchase-money in respect of that interest, the direction that "due regard" is to be had "to the rights and interests of the lord or lords" should be construed to mean a distribution of part of the purchase-money so as to satisfy them for the loss of their rights connected with the manor. This, it seems to me, would be as forced and strained a construction as that which I before remarked on.

Rule absolute, to enter verdict for plaintiff

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BYNNER *against* The QUEEN.

On scire facias, brought in the Petty Bag Office in Chancery, to repeal letters patent for an invention, if issues of fact are joined there, and the record sent to the Queen's Bench for trial, which is had, and a verdict found for the Crown, the Queen's Bench, though the letters patent remain in Chancery, may give judgment that they be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, quashed and annulled, and that they be restored to the Court of Chancery, there to be cancelled.

WRIT of error, directed to the Chief Justice of the Queen's Bench, reciting as follows: "Forasmuch as, in the record and proceedings, and also in the giving of judgment, upon a certain writ of scire facias issued out of our High Court of Chancery for the purpose of repealing certain letters patent heretofore granted under the Great Seal of the United Kingdom of *Great Britain* and *Ireland* to one *Jeremiah Bynner* for an invention of certain improvements in lamps, which record was in our Court before us in our Chancery, and which afterwards, to wit on the 15th day of *April* A. D. 1842, *John Singleton*, Lord *Lyndhurst*, our Lord High Chancellor of the United Kingdom of *Great Britain* and *Ireland*, with his own proper hands delivered into our said Court before us, and judgment has thereupon been given in our last mentioned Court, as it is said, manifest error hath intervened" &c. The writ of error then recited in the usual manner stat. 11 *G.* 4. & 1 *W.* 4. *c.* 70. *s.* 8., and commanded the Lord Chief Justice to send to the Exchequer Chamber "a transcript of the record and pro-

Semble, that, for execution of the judgment that the enrolment be cancelled, it would be sufficient to send a transcript of the record to the Court of Chancery by certiorari and mittimus, that Court having only a ministerial duty to perform in cancelling the patent after the judgment in B. R.

ceedings aforesaid, with all things touching the same," &c. (the ordinary conclusion).

The Lord Chief Justice certified "the record and process of the plaint whereof mention" was in the writ made, "in a transcript" thereunto annexed &c., which set forth the proceedings on scire facias as follows.

"Pleas before our Lady the Queen, of *Easter* term," &c. (5 *Vict.*). "*England*, to wit. Be it remembered that the Right Honourable *John Singleton*, Baron *Lyndhurst*, Lord High Chancellor of *Great Britain*, on the 15th day of *April* in the same term, before our Sovereign Lady the Queen at *Westminster*, hath delivered here into Court, with his own proper hands, a record had before our said Lady the Queen in her Chancery, in these words, that is to say: Pleas before our Lady the Queen in her Chancery at *Westminster* in the county of *Middlesex*, of the term of *Easter*, in the 5th year" &c. "Our Lady the Queen sent to her sheriff of *Middlesex* her writ closed" &c. Then followed the scire facias, charging that *Jeremiah Bynner*, now plaintiff in error, had obtained letters patent for an invention of improvements on lamps ("as by the said letters patent, enrolled in our said High Court of Chancery, amongst other things will more fully and at large appear"), and that Her Majesty had been given to understand that the supposed invention, at the time when the patent was granted, was not a new invention &c., (stating several objections), by means whereof the patent was and ought to be void; and requiring the sheriff to give *Bynner* notice "that he be before us in our Chancery on" &c., "to shew if he hath or knoweth of any thing" &c. "why the said letters patent so granted to him as aforesaid, and the enrolment of the same, for the reasons aforesaid, ought

not to be cancelled, vacated and disallowed, and those letters patent restored into our said Chancery, there to be cancelled; and further to do and receive those things which our said Chancery shall consider in this behalf: and have there the names of those by whom you shall so give him notice, and this writ." The record then stated the sheriff's return and the appearance of *Bynner* in the Court of Chancery; prayer by the Attorney General that the letters patent and enrolment thereof might be cancelled, and the patent restored to the Chancery for that purpose; pleas by *Bynner*, concluding to the country, and issues thereon. The allegations on which issue was joined were: That the grant was contrary to law, and prejudicial &c.: That the invention, at the time of the grant, was not new &c.: that it was not invented and found out by *Bynner*: that *Bynner* was not the first and true inventor: that before and at the time of the grant the invention was used by others in *England*: that, before and at the time &c., part of the said invention was used by others in *England*: that the said invention was not a manufacture within the intent &c. of stat. 21 *Ja.* I. *c.* 3.: and that, although *Bynner* caused an instrument to be enrolled in Chancery within six months &c., pretending to describe therein the nature of the said invention, &c., he did not therein, or by any other instrument &c., describe the same according to the true intent &c. of the proviso in the letters patent. The record then set forth the award in Chancery of a venire facias, returnable in the Queen's Bench; appearance, in the Queen's Bench, of the Attorney General on the part of the Crown, and of *Bynner* by his clerk in Court, at the return of the venire; award of a distringas with the usual clause of nisi prius; re-

turn of the postea by *Coleridge* J., who tried the cause in the absence of the Lord Chief Justice; the verdict, which appeared by the postea to have been given for the Crown on all the issues except as to the invention being a manufacture within the statute: and the judgment of the Court of Queen's Bench (*a*), which was as follows:

"It is considered" &c. "that the said letters patent of our said Lady the Queen, so granted to the said *Jeremiah Bynner* as aforesaid, be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing; and also that the enrolment thereof be cancelled, quashed and annulled; and that the said letters patent be restored into her said Majesty's Court of Chancery at *Westminster* aforesaid, there to be cancelled: And the tenor of the said record, so delivered by the said Lord High Chancellor into the said Court of our said Lady the Queen before the Queen herself, and of all things had thereupon in the same Court of our said Lady the Queen before the Queen herself, is remanded into the said Chancery of our said Lady the Queen."

The writ of error stated the following grounds of error in addition to the common assignment. "That the said Court of our Lady the Queen before the Queen herself has given judgment upon and in respect of the record aforesaid; whereas by the law of the land the said record ought to have been returned and remanded into the Court of our Lady the Queen before our said Lady the Queen in her Chancery, that judgment might thereon be given upon and in respect of the said

(*a*) Signed, *February* 24th, 1844.

record." "That the said Court" &c. (of Q. B.) "has given judgment that the said letters patent be revoked" &c., "and held for nothing, and also that the enrolment thereof be cancelled" &c., "and that the said letters patent be restored into Her said Majesty's Court of Chancery at *Westminster*, there to be cancelled, whereas by the law of the land it nowise belongs or appertains to the said Court" &c. (of Q. B.) "to pronounce such judgment as aforesaid, but only to the Court of our Lady the Queen before the Queen in her Chancery." "That the said Court" &c. (of Q. B.) "has given judgment that the said letters patent be revoked" &c. "and held for nothing, and that the said letters patent be restored into Her said Majesty's Court of Chancery at *Westminster*, there to be cancelled: whereas by the law of the land it nowise belongs to the said Court" &c. (of Q. B.) "to pronounce such judgment, but only to the office of the Lord High Chancellor." "That the said Court" (of Q. B.) "has no power, authority or jurisdiction to pronounce such judgment, but, by the law of the land, the said record so delivered by the said Lord High Chancellor into the said Court" (of Q. B.), "and the proceedings thereupon had, should be remanded back into the said Chancery of our said Lady the Queen." And: "That the said Court of our Lady the Queen before the Queen herself, and the said Court of our Lady the Queen before the Queen in her Chancery, have not, nor has either of them, any power, authority or jurisdiction to pronounce such judgment as aforesaid, or to entertain such proceedings as aforesaid, or to inquire or take cognizance of the matters and things in the said record set forth and contained, forasmuch as it belongs only to

our Lady the Queen in her own proper person, and to the lords and others of her most Honourable Privy Council, to take cognizance of the said matters and things, and to cancel and vacate the said letters patent; and to no other Court or jurisdiction whatsoever."

Joinder in error.

The writ of error was argued in *Hilary* vacation (*a*) and *Easter* vacation (*b*) of this year.

Webster, for the plaintiff in error. Although the issues were tried in the Queen's Bench, the record of the letters patent is in the Court of Chancery, and the judgment for cancellation of the enrolment should have been given there. The proceedings certified to this Court are all in the Court of Chancery, down to and including the award of a venire facias: after that, for the purpose of trial, a copy of the proceedings in the Petty Bag Office is sent to the Queen's Bench, and is enrolled and becomes a record there for the purpose of trial. On verdict and judgment for the Crown, that record should have been transmitted again to the Court of Chancery, as ground for an application to be made there that the patent should be brought into that Court and there cancelled. That was the course taken in *Regina* v. *Newton* (*c*), which came before Lord *Lyndhurst* C. assisted by the Master of the Rolls. The patent itself, there, could not be produced; but the Lord Chancellor ordered the enrol-

(*a*) *February* 2d, 1846, before *Tindal* C. J., *Maule*, *Cresswell* and *Erle* Js., and *Parke*, *Alderson* and *Rolfe* Bs.; and *February* 3d, before *Tindal* C. J., *Coltman*, *Maule* and *Cresswell* Js., and *Parke*, *Alderson* and *Rolfe* Bs.

(*b*) *May* 9th. Before *Tindal* C. J., *Maule*, *Cresswell* and *Erle* Js., and *Parke*, *Rolfe* and *Platt* Bs.

(*c*) *May* 28th, 1845. Not reported. See *Hindmarch on Patents*, 425, 6, 7. c. 10. s. 6.

ment to be cancelled, and a vacatur entered (*a*). It may be objected that, here, the "record" of proceedings in Chancery is stated to have been delivered into the Queen's Bench: but the use of this word by the officers of the Court ought not to prejudice the plaintiff in error. An application was made to the Court of Queen's Bench to amend (*b*): but they refused permis-

(*a*) *Webster* also mentioned *Regina* v. *Nickels*, (see, but not on this point, *In re Nickels'* patent, 1 *Phillips*, 36. S. C. *Webst. Pat. Ca.* 650.), where the question as to cancellation of a patent after judgment on sci. fa. signed in Chancery came before the House of Lords, but was not heard, the case being compromised. See *Corn. Cro. Pract.* 202.

(*b*) The QUEEN *against* BYNNER.

Friday, *January* 30th, 1846.

A scire facias to repeal letters patent was issued out of Chancery, returnable there; appearance entered, declaration filed, plea pleaded, and issue joined, in the Petty Bag Office. The case was then sent to the Court of Queen's Bench for trial; and the entry here was, that the Chancellor, with his own hand, delivered "*a record.*" On motion (by a party bringing error) to amend by substituting the words "transcript of a record:" Held that the entry did not require amendment.

Webster moved for a rule to shew cause why the judgment roll should not be amended as after mentioned. The motion was grounded on an affidavit by the clerk to defendant's attorney, stating as follows.

Issue being joined in error in *Bynner* v. *The Queen*, the case stood for argument at the sittings in the Exchequer Chamber after *Michaelmas* term 1845. In the same *Michaelmas* term (*November* 22d) *Bynner*'s attorney first discovered that a clerical error existed in the record of this Court, for that it was therein alleged that the Lord Chancellor did, on &c., at *Westminster*, deliver into this Court with his own proper hand "a record" had before our Lady the Queen in Chancery; whereas, by the law and practice of the Court of Chancery, a transcript of such record, and not the said record, should have been delivered into this Court. The clerks of the Petty Bag Office informed the deponent that the record in Chancery was not in fact delivered into this Court, but only a transcript of such record; and deponent then inspected the original record, which then was, and, as he was informed and believed, always had remained, in the Petty Bag Office. He further deposed that he was advised and believed that the plaintiff in error could not safely argue the errors assigned till the record in the Treasury of this Court should be amended. That he took out a summons, on 22d *November*, calling on the attorney for the prosecution to shew cause why the judgment roll in the Treasury should not be amended by adding the words "the transcript of" after the words "his own proper hands," and immediately before the words "a record;" and that the parties attended by counsel before *Williams* J., who declined making an order. Deponent was informed and believed that the record in the Treasury of this Court was prepared and engrossed by the attorney for the prosecu-

sion, because it would appear sufficiently by the proceedings, and by authorities, whether the document was a record or a transcript. [*Tindal* C. J. It might be both.]

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tion: and the clerk at the Crown Office informed deponent that it had been usual to make up such records in the Crown Office, describing the transcript of a record received from the Court of Chancery as a "record": but deponent verily believed that the final judgment in the present case, signed, and entered on the roll, and carried into the Treasury of this Court, was the first instance of the signing or entering a final judgment after trial on scire facias to repeal letters patent.

Webster argued in support of the motion as follows. In this case the actual record remains in Chancery. *Jeffreson* v. *Morton* (2 *Saund.* 28.) and 6 *Vin. Abr.* 549, tit. *Court of King's Bench*, (G), pl. 5, 10. shew that, when the entire record is removed into this Court, the Court has full possession of it, and judgment may be given; but that the law is otherwise where only the tenor of the record is sent. The judgment here must be finally given in the Court of Chancery, because, the patent being there on record, it is there that the cancelling must take place. See *Rex* v. *Hare*, 1 *Str.* 146. 151. This is the more necessary since stat. 5 & 6 *W.* 4. *c.* 83., because, by sect. 1, a disclaimer may now be entered in Chancery; and the Chancellor, even after verdict, ought to have the power of determining whether the disclaimer did not save the patent from being cancelled. The case, therefore, is unlike that of scire facias on a recognizance, which was the proceeding in *Jeffreson* v. *Morton* (2 *Saund.* 23.). The error here has been made by the officer of the Court, who mistook the fact: the Court will therefore amend: otherwise it will be said, in the Court of error, that the whole cause appears by the record to be removed, and that the Court of Queen's Bench had therefore jurisdiction.

Hugh Hill shewed cause in the first instance. The defendant is too late in his application, and is not in a position to claim the indulgence, even if the Court had power to amend, which they have not. (The argument on this point is omitted. The following authorities were referred to. 2 *Vin. Abr.* 309, tit. *Amendment* (F), pl. 1.; ib. 320 (I), pl. 2.; *Green* v. *Miller*, (2 *B. & Ad.* 781.); *Paddon* v. *Bartlett*, (3 *A. & E.* 887), note (*a*).) But the record is correct. When issues of fact are sent from Chancery to be tried here, a duplicate record is made out: in effect, the record is in both Courts. In *Rex* v. *Leonard* (*Palm.* 322.) a supplicavit issued to justices of the peace and the sheriff to bind a party to good behaviour; the sheriff did not meddle in the execution, but returned that the execution of the writ appeared within: and a memorandum was made by

The record, and part of the proceedings, being in Chancery, the case must be remanded to that Court, in order that there may not be two judgments of cancellation. If

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the justices, that they had bound the parties over: afterwards a scire facias issued from Chancery on the recognisance: issue in fact was joined; the record was transmitted to this Court ("le record transmit al Court de B. R. per tryer le issue"); and the issue was found for the Crown. It was objected, in arrest of judgment in this Court, that the return ought to have been made by the justices: to which one answer was, that the writ and recognizance were not before this Court, the originals being in Chancery, and not removed hither. But the Court said "que quand un record est mise per mittimus, ou deliver per manus del Chancellor hors Chancery d'estre try in cest Court, que comment le Chancery teigne possession de original record; uncore un record est venu in cest Court, sur que judgment serra done icy per condemner ou acquitter; et judgment poet estre arrestus icy, et execution alera hors cest Court, et ne unques serra le cause remit al Chancery arere." As to this, the case of scire facias to repeal letters patent is not excepted from the general rule: in 2 *Tidd's Practice*, 1095 (9th ed.), it is laid down that judgment is to be given in the Court of King's Bench; and it is assumed throughout that the actual record is transmitted hither from Chancery. There are numerous precedents: *Rastell's Entries*, 461 *a*, (a petition of right in Chancery, 7 & 8 *H.* 8.), *Mark Steward's Case* (9 *Rep.* 29 *b.* 103 *b.*), *Digges's Case* (1 *Rep.* 157 *a.*, 172 *b.*), *Molineux* v. *Lacon* (*Cro. Ja.* 12.), *Fitz. Abr.*, *Peticion*, pl. 21., *Rex* v. *Holland* (1 *Rol. Abr.* 534. tit. *Court* (G), pl. 3.), *Sarnfield's Case* (cited in *The Prince's Case*, 8 *Rep.* 23 *a.*). Several recent records may be found in the same form in the Treasury of this Court. (*Hill* mentioned some instances.)

Webster, in support of the rule. There would be no objection to the entry that the Chancellor delivered &c. if, technically, the fiction that the record is so delivered by the Chancellor into this Court agreed with the real state of the case. But that depends on the question whether execution issue in one Court or the other. Now here it appears by affidavit that the transcript only is brought into this Court: the original record, and the letters patent, are in the Court of Chancery, and the execution of the judgment by annulling the letters patent must be awarded there.

Lord DENMAN C. J. I am not satisfied that there has been any mistake. The course of precedents appears to warrant what has been done: and stat. 5 & 6 *W.* 4. *c.* 83. makes no difference.

the document now in the Queen's Bench be a record, it would be incorrect to say, in this instance, that a record once brought into the Court of Queen's Bench cannot be sent back. That was laid down in *Jeffreson* v. *Morton* (*a*); but the language used here is inconsistent with such a proposition; for the judgment is, that "the tenor of the said record" "is remanded unto the said Chancery." The Court of Queen's Bench may perhaps have power to adjudge that the letters patent be revoked &c. and had and held for nothing; but they could not award that the enrolment, which is on the rolls of the Court of Chancery, should be cancelled, or that the letters patent should be restored into the Court of Chancery for that purpose. The prosecutor of the sci. fa. gives a bond to the chief clerk of the Petty Bag Office, conditioned for payment of costs to the patentee, if the result should entitle him to them (*b*). In the present case, the patentee is entitled to costs on one issue; the judgment is entire; and, if the judgment of cancellation be not awarded by the Court of Chancery, he may lose his remedy for costs. And, further, the judgment in the Court of Queen's Bench is not conclusive. Even at common law, the Court of Chancery might, after conviction on scire facias, have suspended the entry of judgment to vacate the patent, as appears by the form, in 2 *Richardson's Com. Pl.* 392. 394. (ed. 4.), of the

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COLERIDGE J. concurred.

WIGHTMAN J. *Jeffreson* v. *Morton* (2 *Saund.* 23.) applies.

(PATTESON J. was absent.)

Rule refused.

(*a*) 2 *Saund.* 27.

(*b*) See *Webst. Pat. Ca.* 64. note (*a*).

king's warrant (*a*) for a sci. fa., which used to be granted on memorial; a practice since discontinued; note (*t*) to *Underhill* v. *Devereux* (*b*). And, now, by stat. 5 & 6 *W.* 4. *c.* 83., if judgment were suspended, the patentee might, even in this stage of proceedings, enter a partial disclaimer according to sect. 1, or, by petition heard before the Judicial Committee of the Privy Council, obtain a confirmation of the patent, or a new grant, under sect. 2. In *Jeffreson* v. *Morton* (*c*), to scire facias on a recognizance in Chancery, some defendants pleaded to issue and others demurred; and the entire record was transmitted to this Court, which not only tried the issues, but gave judgment on the demurrer: and it was held that the Court had done rightly, and that the record ought not to have been sent back to the Court of Chancery for hearing on the demurrer. But there no part of the proceedings remained in Chancery; the whole matter was transmitted to the King's Bench; and that Court had power to dispose of it in every respect. Reference was made in that case to the opinion of Lord *Coke*, 4 *Inst.* 80., that "after trial," the record is "to be remanded into the Chancery, and there judgment to be given;" and, in opposition to it, *The Bishop of Lichfield and Coventry's Case* (*d*) was cited: but, there, a scire facias had been brought on a recognizance in Chancery, and the proceedings, and the record of the recognizance also, were transmitted to the King's Bench

(*a*) Reciting that parties must be given to understand that "neglects of duty are not to be slightly passed over," and that "the said *J. W.*" (the patentee) "will have an opportunity of making his defence upon a trial, and even after a conviction, it will still be in our power to suspend the entering of any judgment to vacate the patent."

(*b*) 2 *Wms. Saund.* 72 *x.*, 6th ed.

(*c*) 2 *Saund.* 23.

(*d*) *Yearb. Mich.* 24 *Ed.* 3. f. 73 B, pl. 91.

for trial of an issue: the plaintiff was nonsuited, and brought a new scire facias in the King's Bench: and an objection that the proceeding should have been in Chancery, the plea in the King's Bench being terminated by the nonsuit, was over-ruled, because the record of the recognizance and plea had been transmitted entire to this Court, and there remained no record in the Court of Chancery. And in *Jeffreson* v. *Morton* (*a*) the Court, in adopting the rule that when a record comes into the King's Bench it is never removed thence, must have contemplated those cases in which the whole matter of record is carried to that Court and can be there dealt with. This distinction is supported by the placita in 6 *Vin. Abr.* 548. 550., tit. *Court of King's Bench* (G), pl. 1., pl. 10. The statement that a record, once brought into the Queen's Bench, "shall not in any case be sent back to the Chancery" clearly goes too far. Many authorities shew that, for some purposes, records are so sent back: *Bro. Abr. Recorde & matter de ceo*, pl. 79.; *Bro. Abr. Conusaunce*, pl. 61.; *Keilwey*, 93 b., 94 b. pl. 10.; for some not, *Bro. Abr. Judgementes*, pl. 135. After trial of a traverse on an inquisition of lunacy, the proceedings go back to the Court of Chancery as of course, the Court which tried not having authority to carry them farther. Lord *Coke*, treating, in 4 *Inst.* 80., of the jurisdiction of the Lord Chancellor, says that "he hath power to hold plea of scire facias for repeal of the king's letters patents, of petitions, monstrans de droits, traverses of offices, partitions in Chancery, of scire facias upon recognizances in this Court", &c.; and then adds: "In these if the

(*a*) 2 *Saund.* 27

parties descend to issue, this Court cannot try it by jury, but the Lord Chancellor or lord keeper delivereth the record by his proper hands into the King's Bench to be tried there; because for that purpose both Courts are accounted but one, and after trial had to be remanded into the Chancery, and there judgment to be given." In the *Case of Sackvile College* (*a*) *Hale* C. B. says (*b*): "Judgment upon an issue tried in a *scire fac.* to repeal a patent in B. R. is not there given, but the record is to be returned into this Court" (Chancery). The placita, *Fitz. Abr. Petition*, pl. 19, and 1 *Roll. Abr.* 534. tit. *Court* (G), pl. 1. agree with the view now taken of the practice. In the former case, on scire facias to repeal a charter by which the king granted a manor, the record was sent into the King's Bench, and a trial had at nisi prius, and verdict found for the demandant, and, because the charter was in the Chancery, the whole was remanded thither for judgment. In the latter case, "It was shewn to Parliament that a manor was holden of a barony, of a common person, and afterwards the manor was forfeited to the King, and he granted it to another to hold of himself per servitium militare, ubi per legem deberet dici, tenendum de capitalibus dominis feodi illius, &c. et petit that the said charter be amended in the said clause. Whereupon there was a plea in Chancery, and found by the escheator et per juratam there to be true. Et quia judicium super veredicto prædicto et executio judicii pertinent ad officium Chancellarii facienda, ideo mittitur in Chancellariam, et datus est dies usque &c." In *Digges's Case* (*c*)

(*a*) *T. Ray.* 154. 177. (*b*) P. 173. (*c*) 1 *Rep.* 157 *a.*

and *Mark Steward's Case* (*a*), cited in *Jeffreson* v. *Morton* (*b*), and in *Sarnfield's Case* (*c*), where, on scire facias out of Chancery, the Court of Queen's Bench gave judgment, there was no cancelling of any record remaining in the Court of Chancery. The same remark applies to *Bro. Abr. Judgementes*, pl. 135 (citing *Yearb. Mich.* 21 *H.* 7. 35 B. pl. 44.), and to *Keilwey*, 93 b. pl. 10. To adjudge letters patent void (which it is unnecessary to deny that the Court of Queen's Bench may do) is very different from the ulterior process of ordering them to be cancelled, which act of cancelling belongs peculiarly to the office of Lord Chancellor, as is pointed out in 4 *Inst.* 88., and in the argument of Mr. *Yorke* in *Rex* v. *Hare* (*d*). And in *Bro. Abr. Jurisdiccion*, pl. 53, it is said that the Chancery is no Court of record, except to repeal patents of the King on scire facias, and on certain pleas between privileged parties. The particular and limited jurisdiction of the Court of Chancery appears also from *Bro. Abr. Barre*, pl. 45., 1 *Roll. Abr.* 372. tit. *Chancery* (F), pl. 1., 4 *Vin. Abr.* 381. tit. *Chancery* (F): and an exercise of it with respect to a patent appears in *Hunt* v. *Coffin* (*e*). There is no instance of the actual annulling of letters patent by any other authority; though, possibly, under some circumstances, the Sovereign in privy council might declare them void and direct them to be revoked; and the Court of Queen's Bench may, as has been already observed, make a similar adjudication. It is, indeed, said in 4 *Inst.* 72. that a scire facias to repeal a patent

(*a*) 9 *Rep.* 99 *b.*
(*b*) 2 *Saund.* 27.
(*c*) Cited in the *Prince's Case*, 8 *Rep.* 23 *a.*
(*d*) 1 *Stra.* 146. 151.
(*e*) 2 *Dyer*, 197 *b.*

of the King may be brought in the King's Bench; but for this 3 *H.* 4. 7. is cited, the reference intended being to *Yearb. Mich.* 3 *H.* 4. 6 A. pl. 29., where it appears that a scire facias was brought in K. B., and it was held that two writs of scire facias (one in K. B. and one in Chancery) might be brought at once to repeal the same patent. The placitum is given in *Bro. Abr. Briefe & abatement de briefe*, pl. 104, with a quære. And in *Bro. Abr. Petition*, pl. 11, (abridging *Yearb. Hil.* 21 *Ed.* 3. 47 A. pl. 68.) it is expressly stated that scire facias to repeal the King's patent can be brought nowhere but in Chancery. In *Jenk.* 3d Cent. 134, case 74, it was said that "the King's Bench cannot award a scire facias against the patentee;" and the reason was given, which furnishes a key to all the authorities, that "that Court has not the record." It appears from that case, and *Jenk.* 3d Cent. 133, case 71, that that which goes from Chancery to the Queen's Bench is, properly, a transcript, not a record. *Rex* v. *Butler* (*a*) shews that the jurisdiction of the Court of Chancery on scire facias to repeal a patent is founded upon the possession that Court has of the record. *Brewster* v. *Weld* (*b*) may be cited as inconsistent with the doctrine now insisted upon; but the writ there appears to have been made returnable in the King's Bench, not in the Court of Chancery, as the writ is here. The object of the return into Chancery is that the patent may be there dealt with according to the particular jurisdiction of that Court: and therefore the writ here (framed agreeably to the precedent in *Rex* v. *The Governor &c. of Copper-Miners*

(*a*) 3 *Lev.* 220. 323.

(*b*) 6 *Mod.* 229.

in England (*a*)) calls upon the patentee to shew, not only why the letters patent should not be cancelled, but why they should not be restored into the Chancery for that purpose: and the prayer of the Attorney-General on the appearance of parties is in the same terms. It is referred to the Queen's Bench only to try the issues, which the Court of Chancery cannot do: and this materially distinguishes the present case from *Jeffreson* v. *Morton* (*b*) and *The Bishop of Lichfield and Coventry's Case* (*c*). If the proceedings are transmitted from one Court to the other merely for the trial of issues, it is unimportant whether they are styled the "record" or "tenor of the record," or "transcript." The form used in *Regina* v. *Newton* (*d*) is given in *Hindmarch on Patents*, 728, Appendix, c. 2. s. 7. No. 29.; and the term there used is "the tenor of the aforesaid record." The practice on scire facias to repeal letters patent for monopoly of inventions may perhaps differ from that on scire facias respecting grants of lands, offices or markets, because of the difference in the result. In the latter case it is assumed that the grant may continue, but be enjoyed by a different person; in the former, if the grantee has no right, no one has, and the patent is to be extinguished, for which a particular jurisdiction is requisite.

Hugh Hill, contrà. It is not necessary to insist that the Court of Chancery could not have given the judgment in question: it is enough to shew that the judgment is one which may be awarded by the Court of

(*a*) 2 *Lil. Entr.* 411. 419.
(*b*) 2 *Saund.* 23.
(*c*) *Yearb. Mich.* 24 *Ed.* 3. f. 73 B. pl. 91., cited, 4 *Inst.* 80.
(*d*) See p. 528, and ibid. note (*c*), antè.

Queen's Bench. The roll returned here to the writ of error is exactly like that in *Jeffreson* v. *Morton* (*a*) as to the formal commencement, by which it appears that the Lord Chancellor has delivered into this Court a record had before the Queen in her Chancery at *Westminster*, in these words &c. The record being so delivered for trial of the issues, it appears by several authorities that the Court of Queen's Bench may not only try but give judgment. In *Gilbert's History and Practice of the High Court of Chancery*, 12, 13, it is said: "If a scire facias issued to repeal any patent, it was returnable into this Court, because there such patents were registered, and there the party came in and pleaded before the Chancellor. And if a demurrer was joined the Chancellor was judge. But if they pleaded to issue, the Chancellor could not award a jury process, but was to carry the record itself over to the King's Bench, who awarded the jury process upon it; and afterwards upon the verdict gave judgment." *Blackstone*, 3 *Comm.* 48, says that, if any matter of fact is in issue in Chancery, the Chancellor "must deliver the record propriâ manu into the Court of King's Bench, where it shall be tried by the country, and judgment shall be given thereon." And *Tidd*, 2 *Pract.* 1095 (9th ed.), observes: "Though it is said, that after trial had, the record is to be remanded into Chancery, and judgment to be there given, yet the practice has been to give judgment in the King's Bench:" and, if there be a demurrer to part and issue as to the residue, "the Chancellor delivers the whole record to the Court of King's Bench, and judgment is given there upon the demurrer, as well as upon the

(*a*) 2 *Saund.* 6.

issue:" for which propositions he cites 1 *Eq. Ca. Abr.* 128, pl. 7 (*a*), and *Blaxton's Case* (*b*). The present question was not determined in the case of *Nickels's Patent* (*c*) or in *Regina* v. *Newton* (*d*): but it was asked, in the latter case, what power the Court of Chancery had to enforce the bringing in of the patent to be cancelled; and no answer was given. [*Tindal* C. J. They might cancel the enrolment.] It was noticed by the Lord Chancellor that the tenor only of the record was in the Queen's Bench; but that was not made an objection to the judgment there given. [*Tindal* C. J. If called the record, it might be only the tenor, or such a record as the record at nisi prius in an ordinary cause.] It is at any rate such a record as puts the Court of Queen's Bench in possession of the case for the purpose of giving judgment. That Court, in the present case (*e*), refused to amend the judgment roll where it states that the Lord Chancellor delivered into Court a record, by substituting "transcript of a record," deeming the alteration unnecessary, and the present form the usual one. The law as to judgment in these cases is put on the right ground in *Bro. Abr. Judgementes*, pl. 135. "If an office be traversed in Chancery, and the parties are at issue, and the record is sent into the Queen's Bench for trial, as it should be, and the issue is there found for the plaintiff, he shall have judgment there, and the record shall not be sent back into Chancery for judgment to be given there, for both one and the other is coram rege." The authority referred to is *Yearb. Mich.* 21 *H.* 7. fol. 35 B. pl. 44.,

(*a*) See margin.
(*b*) *Latch.* 3.
(*c*) See p. 529, note (*a*) antè.
(*d*) See p. 528, antè.
(*e*) Antè, p. 529, note (*b*).

where it was argued that, the traverse being in Chancery, and sent here for trial, it ought to be remanded, and judgment given in Chancery, and not in this Court; and the case was compared to that of a foreign release pleaded in *Chester*. But, per *Brudnell* J., "Foreign release pleaded in a franchise shall be tried at common law; and then, after trial, it shall be remanded to the franchise: but, if both the courts are common law courts, the record shall not be remanded: as, if a record is removed into this Court from the Common Pleas, and is tried here, we shall give judgment here, and the record shall not be remanded." *Staunforde, Prerogative*, 77 b. ed. 1590, after defining the judgment of *Ouster le maine*, says: "This judgment sometime is given in the King's Bench and not in the Chancery, and that is in case where the parties descend to an issue, then for the trial thereof they of the Chancery must award a venire facias returnable in the King's Bench." "And when the issue is found for the party, they of the King's Bench shall give judgment and award an *Ouster le maine* without suing for the same in the Chancery, as appeareth in *M.* 21 *H.* 7. fol. 5. and 29 *Li. Ass.* 43 (*a*), and yet the record of the issue that was tried was not sent thither, but only the transcript thereof: but what then? the judgment is to be given upon the verdict which is there of record, and when both Courts be courts of the common law and the King's Courts, they use not to remand anything to the place from whence it came, but to give judgment there where it is tried. And *Sharde* said, that when a record comes once into the King's Bench,

(*a*) In the margin of *Staunforde*, ed. 1567, "*Livery*, p. 10." is referred to. See *Fitz. Abr. Livere*, pl. 10, citing *Yearb.* 29 *Assis.* (165 B.) pl. 43, where the dictum of *Sharde* (*Shardelow J.*) occurs.

it shall never go from thence." The same view of the relation between the Courts of Queen's Bench and Chancery is taken in *Yearb. Mich.* 10 *Ed.* 3. fol. 59 A. pl. 62. The rule is laid down, as in the dictum of *Shardelow*, in *Jeffreson* v. *Morton* (*a*). The proceedings there were, as to the material points, the same as in the present case; and it does not appear that the recognizance itself, on which judgment was given, had been sent down to this Court. It is suggested on the other side that the Court there proceeded on a misconception of *The Bishop of Lichfield and Coventry's Case* (*b*); but that case, though cited at the bar, was not referred to by the Judges. *Jeffreson* v. *Morton* (*c*) is reported in 1 *Mod.* as *Jefferson* v. *Dawson* (*d*); and it is clear from both reports that the main question was whether the Court of King's Bench could give judgment on the demurrer as well as on the issue in fact: it was assumed that they might give judgment on the latter; for a principal argument was, that the King's Bench might give judgment on the demurrer because the record was entire, and that, if they sent the demurrer back to the Court of Chancery for judgment, there must be two executions. In *Rex* v. *Holland* (*e*), where an office was traversed, and venire awarded into this Court from Chancery, *Hale* contended that the King's Bench could not give judgment because the record continued in the Chancery; but the Court held otherwise: and *Hale*'s argument was adverted to and treated as groundless, in *Jefferson* v. *Dawson* (*d*), by *Twisden* J., who said that the record itself was in this

(*a*) 2 *Saund.* 27. (*b*) *Yearb. Mich.* 24 *Ed.* 3. f. 73 B. pl. 91.
(*c*) 1 *Saund.* 23. (*d*) 1 *Mod.* 29.
(*e*) 1 *Roll. Abr.* 534, *Courts* (G), pl. 3. *S. C.*, *Aleyn*, 14.; *Style*, 20. 40. 75. 84. 90. 94.

Court, and could not be sent back; "for that here it is coram ipso rege: so that if we do not give judgment here, there will be a failure of justice." This case rebuts the inference drawn from the expression in *Jenk.* 3d *Cent.* 133, case 71, and 134, case 74, that a "transcript" only is sent to the Queen's Bench. It shews that that which is sent, by whatever name called, is, for the purpose of giving judgment, a record. The Court of Queen's Bench tries the issue and gives judgment; a certiorari is then sued out to remove the record of that judgment into the Court of Chancery for execution, and thereupon the tenor of the record is returned into Chancery with the certiorari. A record now in the *Tower* (among the records of the common law side of the Court of Chancery), *Gloucester*, No. 47, 5 *Hen.* 5, and an extract from which is now in Court (*a*), exemplifies the whole practice. And there are in the *Tower* many such returns of judgments on traverses of inquisitions, with the certiorari annexed. *Bro. Abr.* tit. *Recorde & matter de ceo*, pl. 79, was cited for the plaintiff in error, as shewing that, in the case of a writ of error from the Common Pleas upon a fine, the record itself is sent to the Queen's Bench and removed back: but this point is better explained in 2 *Tidd's Pract.* 1159. "On a writ of error brought on a judgment in the Common Pleas, or any inferior court, in an adverse suit, the record itself is supposed to be removed, that it may remain as a precedent and evidence of the law in similar cases. But in the case of a fine, the transcript only is removed from the Common Pleas; for a fine is but a more solemn acknowledgment or contract of the parties, and is therefore no memorial of the law,

(*a*) See p. 553, post.

and need only be affirmed or vacated: if it be affirmed, the contract stands as it was; if vacated, the justices of the King's Bench may send for the fine itself, and reverse it; or they may send a writ to the treasurer and chamberlain, to take it off the file." And *Fazacharly* v. *Baldo* (*a*) is cited, which case, and the statement in *Tidd*, agree with the view now taken on the part of the Crown. In *Regina* v. *Aires* (*b*), where an issue had been tried in this Court on scire facias to repeal a patent, it was contended that "the record ought to be remitted into Chancery, and judgment given there, and not here." But "the Court said, this point had been so firmly settled in the case of *Jeffreson* (*c*), that they would not suffer it to be debated." Reference was there made to the dictum of *Hale* C. B. in *The Case of Sackvile College* (*d*), which has been cited on the other side: but that is, at most, a remark made obiter; it seems to have no bearing on the context; and may probably be a mistake in the report.

Among the instances in which judgment has been given by the Queen's Bench on scire facias from Chancery is *Fitz. Abr. Peticion*, pl. 21. (*e*), where, the Friars Carmelites having, by covin, obtained a grant of lands from the King to the prejudice of the Bishop of *Winchester*, he petitioned for a repeal of the grant, and, on scire facias, the petition was sent to the King's Bench, and that Court awarded that the land should be reseised into the King's hand and the charter repealed; and that the Friars should be distrained to deliver the charter to be cancelled; which is the proper execution in such a case. The placitum appears also in the

(*a*) 1 *Salk.* 341.
(*b*) 10 *Mod.* 258. 354.
(*c*) *Jeffreson* v. *Morton*, 2 *Saund.* 23.
(*d*) *T. Ray.* 178.
(*e*) Citing *Yearb. Mich.* 17 *Ed.* 3. f. 59 B. pl. 58.

Magdalen College Case (*a*). And in *Sarnfield's Case* (*b*), on scire facias brought upon petition to repeal the grant of a manor by *Rich.* 2., the record was delivered by the Chancellor into the King's Bench, and that Court gave judgment that the grant should be revoked and annulled, and the manor seised into the hands of the King, and delivered to the Prince (the petitioner), to be holden &c. In *Keilw.* 93. b. pl. 10., on traverse of an office found under a commission, the record was delivered by the Chancellor into the King's Bench, and the finding was for the parties disputing the office: a question being made whether this Court could give judgment, all the Court held that it could; and judgment was accordingly given that the inquisition should be held void, and the King's hands amoved from the lands, and that the traversing parties should have and sue out livery in the Chancery. It was held also that this Court could not make livery; but it was adjudged that the record should be sent by certiorari into Chancery, and there the parties should have their livery. In *Rex* v. *Arkwright* (*c*) the King's Bench gave judgment to cancel a patent. In *Yearb. Mich.* 11 *H.* 4. f. 5 A. pl. 13., where scire facias was brought to repeal letters patent for a market, and the record sent to this Court, the power of the Court to give judgment was taken for granted. Other instances in which the Court has exercised, or clearly been held entitled to the like power are: *Yearb. Trin.* 21 *Ed.* 3. 58 B. pl. 13.; a record which has been pointed out by the Master of the Crown Office, *Mich.* 3 & 4 *Phil. & M.* Roll 16 (*d*); *Anonymous*

(*a*) 11 *Rep.* 66 *b.* 73 *b.*
(*b*) 8 *Rep.* 23 *a.*, cited in *The Prince's Case.*
(*c*) *Webst. Pat. Ca.* 64. 74.
(*d*) See p. 553. post.

entry in *Rast. Ent.* 461 a; *Mark Steward's Case* (*a*); *Molineux* v. *Lacon* (*b*); *Blaxton's Case* (*c*); *Regina* v. *Mason* (*d*).

Fitz. Abr. tit. *Peticion*, pl. 19., and 1 *Roll. Abr.* 534. *Court* (G), pl. 1., cited on the other side, are probably both abstracts of the same case: the references, respectively, to the *Yearbooks H.* 46 *E.* 3. and 38 *E.* 3. seem inaccurate. No authority is cited for the dictum in 4 *Inst.* 80., that, on scire facias, after trial of an issue in the King's Bench, the record is "to be remanded into the Chancery, and there judgment to be given:" nor for the dictum of *Hale* C. B., already referred to, in the *Case of Sackvile College* (*e*). At all events this, and the other passages last cited, cannot outweigh the long recognized practice. *Brewster* v. *Weld* (*g*), if relevant, is an authority against the plaintiff in error.

The alleged hardship, that the patentee may be prevented from entering a disclaimer, is at any rate not a conclusive objection: but it may be questioned whether stat. 5 & 6 *W.* 4. *c.* 83. *s.* 1. does enable a party to preserve his patent by a disclaimer after verdict in scire facias. The passage cited from a precedent in 2 *Rich. Com. P.* 394. contains nothing that is more referable to a judgment in Chancery than to one in the Queen's Bench, and it shews only that it was considered to be in the breast of the Sovereign, after any judgment on such a scire facias, to carry out the judgment or to stay it. Here, the plaintiff in error had abundant time, before the judgment, to enter his disclaimer. It is urged that he has succeeded on one issue, and, if this judg-

(*a*) 9 *Rep.* 99 *b.*
(*b*) *Cro. Ja.* 12.
(*c*) *Latch.* 3.
(*d*) 2 *Salk.* 447.
(*e*) *T. Ray.* 178.
(*g*) 6 *Mod.* 229

ment stands, will lose the benefit of the bond given in the Court of Chancery for costs. But such bond is not a necessary, if a legal, condition of the suing out a scire facias to repeal a patent; for any one prejudiced by the granting of a patent is entitled to a scire facias as of right; note (4) to *Underhill* v. *Devereux* (*a*). If the Court of Queen's Bench had not power to adjudge that the enrolment should be cancelled, this Court will give the proper judgment, omitting that clause. But, if the Queen's Bench had power to give a judgment at all, it ought to have been complete.

Webster, in reply. It is conceded on the other side that the Court of Queen's Bench has given a judgment which cannot in all respects be executed. That imperfection makes the whole erroneous. It is not correct to say that, because the *Queen's Bench* could give some judgment, this is good. Everything that has been found against the plaintiff in error might have been remedied by a disclaimer. [*Tindal* C. J. You might have applied to the Court to suspend judgment for that purpose.] The case of *Dacre* in *Fitz. Abr. Peticion*, pl. 19., was cited in *Regina* v. *Newton* (*b*), before Lord *Langdale* M. R., who, in noticing the case, did not appear to question its authority; and the proceedings there were remanded into Chancery where the charter was, to give opportunity for granting a new charter. That accords with the practice contended for by the plaintiff in error. The judgment furnished by the Master of the Crown Office ("quod literæ patentes revocentur, adnullentur et evacuentur, et quòd officium

(*a*) 2 *Wms. Saund.* 72 *u.* 6th ed. (*b*) See p. 528. note (*c*) antè.

in manus domini Regis seisiatur"), and similar ones which have been referred to, go no farther than the judgment in *Sarnfield's Case* (*a*), and stop far short of the adjudication here. The same remark applies to the record from the Tower. In the case *Keilw.* 93 b. pl. 10. the record came to the King's Bench for trial; and the proceedings afterwards agree with the practice now contended for. In *Rex* v. *Arkwright* (*b*) judgment was given in the Queen's Bench "to cancel the patent:" but the point was not contested; and it would have been unavailing to do so, as the patent, at that time, could not have been amended, and judgment would finally have been given in Chancery without any benefit to the defendant from the delay. In the case of the Carmelite Friars, *Fitz. Abr. Peticion*, pl. 21., the dictum as to a distress is only an opinion as to the practice to be pursued, supposing a valid judgment given. *Jefferson* v. *Dawson* (*c*) does not differ in principle from *Jeffreson* v. *Morton* (*d*). *Kelynge* C. J. says in the former case: "If the record come hither entirely, we cannot send it back again:" which is no doubt true when the whole course of proceeding is in the King's Bench, originally or by being adjourned thither: but here that is not the case. In *Rex* v. *Holland* (*e*), as reported in *Style*, the Court of King's Bench said: "the record" (on traverse of an inquisition) "is transmitted hither to determine whether the King or the party hath right;" and "the amoveas manum is but a consequence of the judgment." This agrees with the argument already urged for the plaintiff in error. None of the cases

(*a*) Cited in *The Prince's Case*, 8 *Rep.* 23 *a*.
(*b*) *Webst. Pat. Ca.* 74.
(*c*) 1 *Mod.* 29.
(*d*) 2 *Saund.* 23.
(*e*) *Style*, 94, 95.

cited on the other side shew more than that the Court of Queen's Bench may give some judgment: but the judgment here is different from any which they are competent to give. [*Maule* J. What judgment do you say the Queen's Bench ought to have given?] They could give none. [*Parke* B. Supposing that they ought to have given judgment to annul, but not to cancel; may not we give the same?] Supposing that in some cases the Queen's Bench might so adjudicate, they were not in a condition to do so here, because they had nothing before them but the issues for trial. If the whole matter had been delegated to them, as appears to have been done in *The Bishop of Lichfield and Coventry's Case* (*a*), the power might have been greater.

Cur. adv. vult.

TINDAL C. J., in this vacation (*June* 13th), delivered the judgment of the Court.

This was a scire facias brought to repeal certain letters patent which had been granted to the plaintiff in error. The record before us, which is brought by writ of error from the Court of Queen's Bench, states that the Lord Chancellor "hath delivered here into Court, with his own proper hands, a record had before our said Lady the Queen in Her Chancery, in these words." The record so brought into the Court of Queen's Bench contains the recital of the original writ of sci. fa. issuing out of the Court of Chancery, and returnable there, calling on *Bynner*, the plaintiff in error, to appear and shew &c. (His Lordship stated the requisition of the writ as set forth, p. 524, antè.): And the record

(*a*) *Yearb. Mich.* 24 *Ed.* 3. f. 73 B. pl. 91.

proceeds to state also the grounds upon which the validity of the letters patent is impeached, the appearance and pleas in bar of *Bynner*, and the issues in fact joined thereon, and the award of the writ of venire facias returnable in the Court of Queen's Bench, the appearance there of the Attorney General on the part of the Crown, and of *Bynner* by his clerk in Court, at the return of the venire facias, the award of the distringas with the usual clause of Nisi Prius, and the postea returned by Mr. Justice *Coleridge* who tried the issues. And then follows the judgment of the Court of Queen's Bench in these words: "That the said letters patent" be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing; and also that the enrolment thereof be cancelled, quashed and annulled; and that the said letters patent be restored into her said Majesty's Court of Chancery at *Westminster* aforesaid, there to be cancelled." And the record now brought before us concludes with these words, viz.: "*And the tenor of the said record*, so delivered by the said Lord High Chancellor into the said Court of our said Lady the Queen before the Queen herself, and of all things had thereupon in the same Court of our said Lady the Queen before the Queen herself, is remanded unto the said Chancery of our said Lady the Queen."

And the question raised before us upon this writ of error has been, whether the Court of Queen's Bench has the power of giving the judgment before stated? On the part of the plaintiff in error it has been contended that no more than a transcript of the record is sent down to the Queen's Bench for the purpose of

enabling that Court to try the issues which have been raised in the Court of Chancery, and that, after the trial of such issues, the record so sent to the Court should be returned, with the postea, to the Court of Chancery, to enable that Court to give effect to the judgment of the Court of Queen's Bench, so as to make the actual cancelling of the enrolment of the letters patent the act of the Court of Chancery, as being an act which that Court alone can carry into effect. On the part of the defendant in error it has been contended, on the other hand, that, the record in the action of scire facias being sent to the Court of Queen's Bench, it is the duty of that Court to pronounce the judgment, and that the tenor, that is, an exact transcript of the whole record, is then transmitted to the Court of Chancery to enable that Court to carry the judgment into effect by cancelling the enrolment there.

There are difficulties undoubtedly in the establishing of either of these positions with absolute certainty; and there are conflicting authorities which have been brought forward in favour of both. On the whole, however, we think the balance of the authorities is decidedly in support of the position contended for on the part of the Crown: viz., that the record is sent down to the Queen's Bench; that the Queen's Bench has authority to award the judgment, and afterwards to transmit either the record, or the tenor thereof, to the Court of Chancery in order to be fully carried into execution.

In the first place, the proceedings before us state that the Chancellor "hath delivered here into Court, with his own proper hands, *a record.*" And this is not the form in this instance only, but the general form in other pre-

cedents. (See *Rex* v. *Stone* (*a*); see also *Jeffreson* v. *Morton* (*b*).) In this latter case the great question between the parties was, whether the record itself had been properly sent down from the Court of Chancery to the King's Bench, inasmuch as upon the record there was an issue in fact and also a demurrer in law, both joined in the Court of Chancery upon the same record. And no one appears to have doubted, in that case, that, where there is an issue in fact only, the record must be sent down to the Court of King's Bench as well for the purpose of trying the issue as also to give judgment thereon; but the point raised by the defendant's counsel was, that, where an issue in fact is joined as to part, and a demurrer to another part of the record in Chancery, and the issue is transmitted to the King's Bench to be tried, after the trial of the issue the record ought to be sent back into Chancery for the Chancellor or Keeper to give judgment upon it. But the whole Court delivered their opinions seriatim, that *the record* of the demurrer and issue together was well and legally transmitted, and the Lord Keeper of the Great Seal was also of the same opinion: and in the course of the argument *Digges's Case* (*c*), and *Steward's Case* cited in 9 *Rep.* (*d*), was relied upon; where the record was transmitted into the Queen's Bench and several special verdicts found, and the Court of Queen's Bench retained the records and did not send them back into Chancery, but gave judgment on the special verdicts.

It was objected that, although this might be the practice where a final judgment might be given, and execution had thereon, in the Court of Queen's Bench,

(*a*) *Trem. Pl. C.* 652. (*b*) 2 *Saund.* 6. 23. (*c*) 1 *Rep.* 157 *a.*
(*d*) In *Sir G. Reynel's Case*, 9 *Rep.* 98 b. 99 b.

yet that, in this case, more remained to be done in the Court of Chancery, and which could not be done elsewhere, namely, that the letters patent and the enrolment thereof, which still remained in the Court of Chancery, are directed to be cancelled. But it seems a sufficient answer to this objection that nothing remains to be done in the Court of Chancery but a mere ministerial act by the officers of that Court. And it is clear there is no difficulty in getting an exact transcript of the record of the judgment from the Court of Queen's Bench to the Court of Chancery by certiorari and mittimus. The point, however, and the only point, to be determined by us is, whether the Court of Queen's Bench had authority to give judgment in the case in the form in which they have given it. And we think they had.

Many precedents have been found of judgments given in the Court of B. R. to repeal letters patent, which records are still remaining in the Queen's Bench. In *Mich.* 3 & 4 *Phil. & Mar.* Roll 16. (*a*) is a record of scire facias to repeal letters patent, returnable in the King's Bench. The judgment entered therein in that Court is "quod literæ patentes revocentur, adnullentur et evacuentur, et quod officium (*b*) in manus Domini Regis seisiatur." The case, brought forward in the course of the argument, of the record found in the Tower, *Gloucester*, No. 47, 5 *Hen.* 5. (*c*), is strong to the same point: a scire facias brought by the Abbot of *Cirencester* against the Town of *Cirencester* to repeal a charter to that

(*a*) See p. 545, antè.

(*b*) The scire facias was to repeal a grant of the office of keeper of the gaols of *Ilchester* and *Dorchester*.

(*c*) Antè, p. 543.

town, and judgment given by the King's Bench "quòd charta predicta adnulletur, et penitùs pro nihilo habeatur:" and in that case the tenor of the judgment alone is certified by the Court of B. R. to the Court of Chancery, a certiorari having issued, and the return beginning with "tenor cujusdam recordi" &c. And we are informed, through an officer at the Tower, that to the record, both in the *Cirencester* case and in numerous other cases, a writ of certiorari is tied or pinned to the record of the Court of B. R., at the head of it, with this indorsement of the Chief Justice of the King's Bench: "Executio istius brevis" &c.

Without enumerating or referring to other authorities cited in the course of the argument, we think these are abundantly sufficient to prove that the Court of Queen's Bench has the power of giving the judgment which they have given; and that the same must be affirmed.

Judgment affirmed (*a*).

(*a*) See, now, as to proceedings on scire facias to repeal, cancel or vacate letters patent or charters, Stat. 11 & 12 *Vict. c.* 94., 25th and following sections.

And, as to the practice with respect to issues transmitted from Chancery to B. R. for trial, see Mr. *Hardy*'s note in the Second Appendix to the 7th Report of the Deputy Keeper of Public Records (1846); p. 277.

Doe on the demise of William Dayman *against* Richard Moore.

EJECTMENT for messuages and lands in *Devonshire*. The declaration was of *Easter* term 1844; the demise was laid on 12th *April* 1844.

On the trial, before *Coleridge* J., at the *Devonshire* Spring assizes 1845, it appeared that in 1800 one *Peter Dayman* was seised in fee of the property in question. In that year his daughter *Jane* married the defendant. *Peter Dayman*, in 1801, put his daughter and the defendant in possession of the property: and the two continued to occupy it uninterruptedly, without paying any rent, up to the death of *Peter Dayman*, which took place on 10th *February* 1837. By his will, dated 6th *February* 1837, he devised the property to his daughter *Jane Moore* for life, remainder in fee to his son *William Dayman*, the lessor of the plaintiff. He also devised to *Jane Moore* an annuity of 5*l.* charged on other land. Defendant and *Jane Moore* continued to occupy the property from the death of *Peter Dayman* to the death of *Jane Moore*, which took place in *March* 1843; and thenceforward, to the bringing of the action, the defendant continued in possession. No rent had been paid since the death of *Peter Dayman*. The defendant received the annuity for his wife from the death

In 1801, *D.*, being seised of land in fee, permitted his daughter *J.* and her husband *M.* to occupy as tenants at will. *D.* died in 1837, after the passing (24th *July* 1833) of stat. 3 & 4 *W.* 4. c. 27., but before the expiration of the five years allowed by sect. 15. He devised the land to *J.* for life, remainder to *W.* in fee. He also devised to *J.* an annuity charged on other land.

J. and *M.* occupied from 1801 to *J.*'s death in 1843, no rent being paid. After *J.*'s death, *M.* continued in occupation.

On ejectment brought, in 1844, by *W.*, the remainderman, against *M.*, Held:

That *W.* was not entitled to insist that *J.* and *M.* had held under the devise to *J.*: but that *M.*, although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will.

That sect. 15 was inapplicable, no step having been taken within the five years. And

That the action was barred, under sects 2 and 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will.

of her father to her own. It was contended, on behalf of the defendant, that the action was barred by stat. 3 & 4 *W.* 4. *c.* 27. The learned Judge left it to the jury to say whether the defendant had occupied adversely to *Peter Dayman* or as tenant at will. They found that he had occupied as tenant at will. His Lordship then directed a verdict for the plaintiff, giving leave to move to enter a nonsuit.

In *Easter* term, 1845, *Crowder* obtained a rule nisi for a nonsuit.

In last *Easter* term (*a*),

Butt and *Bevan* shewed cause. Under sect. 15 of stat. 3 & 4 *W.* 4. *c.* 27., if there was no adverse possession at the time of the passing of the act, the party entitled would have five years, from the passing of the act (that is till 24th *July* 1838), during which he could maintain the action. It is true that here no action was brought within such time. The jury have found expressly that the defendant and his wife held as tenants at will to *Peter Dayman*, and not adversely to him, and that tenancy would expire on his death, namely on 10th *February*, 1837. At that time the five years from the passing of the act, 24th *July* 1833, were running. The right of the lessor of the plaintiff, however, did not accrue till the death of the defendant's wife in *March* 1843. Before that, he could not enter, because the wife held, from the determination of the tenancy at will by her father's death, as tenant for life under her father's will. [*Coleridge* J. The case on the other side is, that, if you cannot avail yourself of sect. 15, you

(*a*) The case was argued on *April* 30th and *May* 4th, 1846. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

cannot recover, inasmuch as *Peter Dayman*, at the time of his death in 1837, was barred from recovering the estate by the lapse of twenty years, his right having, under sect. 7, accrued at the end of the first year of the tenancy at will.] As the defendant and his wife had not disclaimed, they must be considered as having elected to take under the devise to the daughter for life. [*Coleridge* J. Suppose a man chooses to devise my own land to me: must I disclaim, in order to avoid taking under the devise?] Here there is an acquiescence in the will by accepting the annuity; *Noys* v. *Mordaunt* (*a*). And the jury found that there was no possession adverse to the title of *Peter Dayman*. [*Coleridge* J. The effect of that is only that he might have recovered if he had brought an action within the five years. Suppose he had lived six years after the statute passed.] He would have been barred; *Nepean* v. *Doe dem. Knight* (*b*). [*Coleridge* J. Then could his devisee have recovered? And, if not, can the remainder man recover here?] He can, under sect. 7. [*Patteson* J. Certainly, if there were a tenant at will who paid the rent up to the time of the reversioner's death, and the reversioner devised to *A.* for life, remainder to *B.*, *B.* might maintain ejectment on *A.*'s death, although no rent was paid during *A.*'s life.] He might: and the present case, in effect, is the same. The lessor of the plaintiff here could not bring an action during the life of the daughter, because she was entitled under the will, even without entry; *Co. Lit.* 111 *a.*; and she might have insisted on that title, even though she had claimed to hold independently of the will; *Doe dem.*

(*a*) 2 *Vern.* 581. Cited in 1 *Pow. Dev.* 430. 432. (3d ed.).
(*b*) 2 *M. & W.* 894.

Smyth v. *Smyth* (*a*). The relation of tenant and landlord continued up to the death of *Peter Dayman*, and then terminated, no act having been done to turn such tenancy into an adverse holding, as in *Turner* v. *Doe dem. Bennett* (*b*); and, according to that case, even if there had been such a determination, a fresh tenancy might have been inferred from acts of assent by the reversioner. That may be so here. Also a tenancy may be determined by the tenant or the reversioner conveying the property; *Watkins's Principles of Conveyancing*, p. 2. (9th ed.), *Dinsdale* v. *Isles* (*c*), *Daniels* v. *Davison* (*d*). [*Patteson* J. If a new tenancy is to be inferred from the mere holding on of the tenant at will, the statute never could apply at all to cases of tenancy at will.] Why not infer a new tenancy at will commencing at *Peter Dayman*'s death, if the title under the devise is abandoned? It never has been expressly decided that the time runs absolutely from the end of the first year, when the tenancy at will is put an end to afterwards. In *Turner* v. *Doe dem. Bennett* (*e*) the Judges avoided expressly determining on this point: and the fairer construction appears to be to confine the operation of this part of the clause to cases where no actual determination of the will has taken place. Enactments which take away the rights of parties ought to be strictly construed; per *Holroyd* J. in *Buckeridge* v. *Flight* (*g*); and this rule was applied to a limitation clause of the present statute in *Farran* v. *Ottiwell* (*h*). Further, the effect of sect. 15

(*a*) 6 *B. & C.* 112.

(*b*) 9 *M. & W.* 643. See *Doe dem. Bennett* v. *Turner*, 7 *M. & W.* 226.

(*c*) 2 *Lev.* 88.

(*d*) 16 *Ves.* 249. 252.

(*e*) 9 *M. & W.* 645.

(*g*) 6 *B. & C.* 49. 55.

(*h*) 2 *Jebb & Symes* (*Irish Exch. Rep.*), 97. 109. 155.

seems to be that the estate of the party entitled, where there is no adverse possession, lasts five years from the passing of the statute: if so, there was here no holding as against the lessor of the plaintiff till 1838. That seems to have been the view of the Court in *Culley* v. *Doe dem. Taylerson* (*a*). And, as to sect. 7, if the tenancy at will had expired before the act passed, the time would have run only from such expiration, however long the tenant at will had held without paying rent; *Doe dem. Evans* v. *Page* (*b*). Nor is it clear that sect. 3 can apply here at all, inasmuch as the interest claimed by the lessor of the plaintiff is not the same interest as that of the devisor. This point has been the subject of discussion in Sir *Edward Sugden*'s remarks on the two cases of *James* v. *Salter* (*c*), *Sugd. Vend. & Purch.* p. 618 &c. (11th ed.).

Crowder and *Montague Smith*, contrà. The lessor of the plaintiff can have no better title than the devisor. Now, under sect. 7, the devisor, unless he brought an action within five years of the passing of the statute, was barred, if there was a tenancy at will; and here that tenancy is found by the jury. It is argued that, where there is an actual determination of the tenancy at will, the time runs from such determination: but, if that were so, the enactments respecting tenancies at will would be altogether inoperative; and the time might be longer, in the case of a tenancy at will, than in the case of a tenancy from year to year without payment of rent, under sect. 8. It is said that it never has been decided that the time runs absolutely from the expiration of the first year of the tenancy at will. [*Patte-*

(*a*) 11 *A. & E.* 1008. 1025. (*b*) 5 *Q. B.* 767.
(*c*) 2 *New Ca.* 505.; 3 *New Ca.* 544.

son J. The Judges seem to have avoided the point: I always have.] *Parke* B., in *Doe dem. Bennett* v. *Turner* (*a*), assumes that it so runs. Then, sect. 15 is inapplicable, because the remedies given by that enactment have not in fact been pursued. There is no pretence for arguing that the estate itself was to be kept alive during these five years; and the expression in *Culley* v. *Doe dem. Taylerson* (*b*) has no such meaning. In *Nepean* v. *Doe dem. Knight* (*c*) the Court of Exchequer held that the statute had put an end to the distinction between adverse and non-adverse possession, except when sect. 15 applied. Sect. 7, it is true, mentions two points of time, the determination of the tenancy and the end of the first year. But this must be read as if the words "whichever shall first happen" were added: otherwise the mention of the first year is entirely superfluous; and it is observable that the section adds, to the words "at the expiration of one year next after the commencement of such tenancy," the words "at which time such tenancy shall be deemed to have been determined." In *Doe dem. Evans* v. *Page* (*d*) this Court suggests the construction of sect. 7 now contended for on behalf of the defendant. Sir *Edward Sugden*, *Vend. & P.* 622 (11th ed.), lays it down that the effect of twenty one years' possession by the tenant at will, is to "vest the fee simple in the tenant at will, for the remedy of the owner will not only be barred, but his estate extinguished."

Cur. adv. vult.

Lord Denman C. J., in this vacation (*June* 27th), delivered the judgment of the Court.

(*a*) 7 *M. & W.* 234.
(*b*) 11 *A. & E.* 1025.
(*c*) 2 *M. & W.* 894.
(*d*) 5 *Q. B.* 771.

The defendant in this case had married a daughter of *Peter Dayman*, which *Peter Dayman* was unquestionably owner of the premises in question. He suffered the defendant and his wife to occupy them without paying any rent, and himself paying the taxes, for upwards of thirty years; and they were so in the occupation at the time of the passing stat. 3 & 4 *W.* 4. *c.* 27., 24th *July* 1833. Let it be assumed that, by this state of things, the defendant was tenant at will to *Peter Dayman*: then the seventh section of the statute applies; for, although in *Doe dem. Evans* v. *Page* (*a*) that section was held not to be retrospective, yet it certainly applies where there has been no express act done to determine the tenancy at will up to the time of the passing of the statute. By the seventh section, therefore, coupled with the second, more than twenty years had elapsed since the expiration of a year from the commencement of the tenancy, and *Peter Dayman*'s right of entry was gone, except so far as it was saved by the fifteenth section, viz. for five years after 24th *July* 1833. Now *Peter Dayman* did not avail himself of that clause. He suffered things to continue as they were till his death in 1837. His heir might have entered within the five years; but he did not: and, in *July* 1838, all benefit of the fifteenth section to any one was at an end.

But it appears that *Peter Dayman* by his will left the premises to the defendant's wife for life, and after her death to the lessor of the plaintiff. And this ejectment is brought by him upon her death. By the same will an annuity is given to the defendant's wife, which the defendant received continually. And it is therefore

(*a*) 5 *Q. B.* 767.

argued that the defendant must be taken to have been in possession since *Peter Dayman*'s death in right of his wife's life estate, and not either as tenant at will or a wrong doer. We do not think that the defendant is concluded by his receipt of the annuity. Such receipt could at most operate only as a recognition of the will in general, that is, of its due execution and of the capacity of the testator: but it cannot be any admission of the validity of any particular devise, or of the seisin of the testator in any particular premises. The statute had run against the testator, subject to the right reserved by the 15th section; and the defendant was at liberty to insist on that defence, and on the estate which he had thereby acquired, and to disregard the estate for life which *Peter Dayman* had professed to devise to the wife.

This case is remarkable; because, if any other person had been in possession under the same circumstances, the defendant's wife, being devisee for life, would have had the remainder of the five years up to *July* 1838 to enter, under the 15th section. But it does not follow that she must be taken so to have entered as against her own husband, and to have clothed herself with the life estate under the will. And, if not, this ejectment is too late.

Upon the whole, we are of opinion that the rule must be made absolute.

Rule absolute.

LAWTON *against* HICKMAN; LOONIE *against* OLDFIELD; EADON *against* BRANSON; O'NEIL *against* BRINDLE; RAY *against* HIRST.

LAWTON *against* HICKMAN.

DEBT "for the price and value of goods and chattels" sold and delivered by plaintiff to defendant; and on an account stated.

Plea (the last): That the goods and chattels in the declaration mentioned were and are divers, to wit ten,

Sect. 26 of the Joint Stock Companies' Registration Act, 7 & 8 *Vict.* c. 110., prohibiting the sale of shares before complete registration,

does not apply to railway companies requiring an act of parliament, those companies being, in terms, exempted from the operation of the act by the first proviso of sect. 2, and not excepted out of that clause by any subsequent special provision.

A railway company is sufficiently brought within the enactment of that clause in pleading, if it be averred that the Company was established in *England* for the purpose of making and maintaining a certain railway, to be called &c., under the authority of an act of parliament to be obtained for that purpose with the usual powers to take land for the purposes of the said railway, and to take tolls from persons using the said railway, and other powers and authorities usually granted by parliament to railway companies; and that the purposes of the said joint stock company and the said railway intended to be executed by them could not be carried into execution without first obtaining the authority of parliament in that behalf. So held on special demurrer.

It is not necessary, in such pleading, to aver that the Company was established for the *sole* purpose of making a railway. So held on special demurrer.

The Court, in construing such a plea, will take notice that the purposes of such a railway company, though not all specified in the pleading, require the authority of parliament for their being carried into execution.

Where the plea (to an action for the price of shares) sets up as a defence the want of complete registration before the transfer, it is enough if the replication aver that the Company is a company for executing a work which cannot be carried into execution without obtaining the authority of parliament, that is to say, a railway. So held on special demurrer.

The price of railway shares may be recovered under a declaration for "goods and chattels" sold and delivered. So held, on special demurrer, alleging that plaintiff had declared for the price of goods and chattels, whereas it appeared by the replication that he sued for the price of railway shares.

A plea, relying on the want of complete registration, does not describe the company, so as to bring it within sects. 2 and 26, unless it deny that the company was a banking company &c., so as to negative the exception in sect. 2, though it be averred generally that the company required registration under the act. So held, on demurrer to the replication

shares of 25*l.* each, of and in the capital stock of a certain joint stock company, viz. a joint stock company called and known as *The Grand Union Railway Company*, illegally sold and delivered by plaintiff to defendant by the delivering of the scrip certificates of and for the said shares after 1st *November*, A. D. 1844, to wit on &c., for a certain sum of money, to wit 25*l.*, contrary to the form of the statute in such case made; and that the supposed sale and delivery in the declaration mentioned was and is the said illegal sale and delivery; and that the money in the declaration mentioned was and is parcel of the said price and value of the said shares so illegally sold and delivered, and no other money; and that the account in the declaration mentioned was stated of and concerning the money supposed to be due from defendant to plaintiff for the price and value of the said shares so illegally sold and delivered, and no other money; and the money found to be due upon the said account was and is the money so supposed to be due, and no other money. And defendant further says that the said joint stock company was, before and at the time of the said sale and delivery, a joint stock company established in part of the United Kingdom of *Great Britain* and *Ireland* other than *Scotland*, to wit in the county of *Derby*, for the purpose of profit to the shareholders, subscribers and members thereof, and was not a banking company, or school, or scientific or literary institution, or friendly society, loan society, or benefit building society enrolled under the statutes in force respecting such society; and the said joint stock company, before and at the last mentioned time, was a partnership, whereof the capital (to wit) 1,800,000*l.*, was agreed to be divided into shares, to wit 7200 shares of 25*l.*

each, and so as to be transferable without the express consent of all the co-partners; and that the said joint stock company was not, at the time of the said sale, incorporated by statute or charter, or authorised by statute or letters patent to sue and be sued in the name of any officer or person; and that the formation of the said joint stock company was commenced after 1st *November*, A. D. 1844 (*a*), to wit on 1st *January*, A. D. 1845; and that the said joint stock company had not, at any time before, or at, the time of the said sale and delivery, obtained a certificate of complete registration as required by the statute in such case made (*b*); and that plaintiff, before and at the time of the said sale and delivery, claimed to be entitled to the said shares so sold and delivered, and sold and delivered the same to defendant, as being so entitled. Verification.

Replication. That the said joint stock company in the said last plea mentioned was established as in that plea mentioned for the purpose of making and maintaining a certain railway to be called (to wit) *The Grand Union Railway*, under the authority of an act of parliament to be obtained for that purpose with the usual powers to take land for the purposes of the said railway, and to take tolls from persons using the said railway, and other powers and authorities usually granted by parliament to railway companies: and the plaintiff further says that the purposes of the said joint stock company and the said railway intended to be executed by them could not be carried into execution without first obtaining the authority of parliament in that behalf: and the plaintiff further says that, before and at the time of the said sale and delivery of the said scrip certificates

(*a*) Stat. 7 & 8 *Vict. c.* 110. *s.* 1. (*b*) Sects. 7, 26.

in the said last plea mentioned, the said joint stock company was a company for executing a railway within the true intent and meaning of that part of the statute passed &c. (7 & 8 *Vict. c.* 110.), entitled "An act for the registration, incorporation, and regulation of joint stock companies," whereby it was enacted and provided (*a*) as follows (that is to say): "Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock which cannot be carried into execution without obtaining the authority of parliament." And the plaintiff further says that within twelve months next before the said sale and delivery &c., to wit on &c., the said joint stock company was provisionally registered, and obtained a certificate of such provisional registration pursuant to the said last mentioned act. Verification.

Demurrer, assigning for causes: That the circumstance of the said company being established for the purpose in the said replication mentioned does not render the sale and delivery of the said shares, goods and chattels in the said account stated legal; nor does such circumstance entitle the plaintiff to recover the sum of money in the declaration mentioned, or any part thereof. That the replication is uncertain, inasmuch as it does not state the nature of the said railway, or the termini thereof, nor can it be seen from the said replication that the said railway was a railway which could not be carried into execution without the authority of Parliament; and it is consistent with the said replication and all the allegations therein that the said railway

(*a*) Sect. 2.

might be carried into execution without the authority of parliament, since it merely appears that the said company was established for the purpose of making and maintaining a certain railway to be called &c., under the authority of an act of parliament with certain powers therein referred to; and it is consistent with the said allegations that the said railway might and could be made without the authority of parliament; and, although it is alleged that the purposes of the said joint stock company and the said railway could not be carried into execution without first obtaining the authority of parliament, it does not appear that the said railway could not be carried into execution without such authority. That the allegation that the said joint stock company was a company for executing a railway, within the true intent and meaning of the statute therein referred to, is uncertain and too general, and is an allegation of a conclusion of law and not of matter of fact, and no certain issue in fact can be taken thereon, nor can any issue be taken thereon without leaving to the jury questions on the construction of the statute. That it does not appear that, at the time of the sale and delivery &c., the said company was a company for executing a certain railway; and, although the said company was established for such purpose, it might not have had that object in view at the time of the said sale and delivery. That it does not appear, in or by the said replication, that the purpose of making a railway was the sole purpose for which the said company was established, and which it had in view. And that the replication is a departure from the declaration, and admits that what are called in the declaration goods and chattels are shares in a joint stock company, which are not goods

or chattels, but choses in action, and the plaintiff cannot recover the price and value of the said shares under his declaration for goods and chattels sold and delivered.

Joinder.

The demurrer was argued in last term (*a*).

Pashley, for the defendant. First: The illegality alleged in the plea consists in the shares having been sold before complete registration, contrary to stat. 7 & 8 *Vict. c.* 110. *s.* 26., where it is enacted, "with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint stock company the formation of which shall be commenced after the 1st day of *November* 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for or sale or disposal of such share or interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding 10*l.*" The plaintiff, to remove this objection, relies upon sect. 2. That enacts that the statute shall apply to every joint stock company (as after defined) established in any part of the United Kingdom, except *Scotland*, &c., "for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies, respectively duly certified and enrolled under

(*a*) *June* 5th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

the statutes in force respecting such societies, other than such friendly societies as grant assurances on lives to the extent hereinafter specified;)" it then defines "joint stock company" as comprehending, among other things, "every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners;" and adds, after some other enactments: "Provided nevertheless, that, *except as hereinafter specially provided*, this act shall not extend to any company for executing any bridge," "railway," &c. "which cannot be carried into execution without obtaining the authority of parliament." And the question is, whether the present is a case exempted from the general operation of the act by this proviso, or brought within that operation again by the special exception. Now, to meet the exception as to cases "specially provided" for, it is not necessary to discover a provision in express words: it is sufficient if a clear intention to except the particular case can be ascertained from the whole context of the act. The Court of Exchequer has decided, in *Young* v. *Smith* (*a*), that no provision to this effect can be found, and, therefore, that railway companies requiring an act of parliament are not within the exception of the proviso in sect. 2. The learned Barons who gave judgment in that case appear to have assumed that the provision was to be found, if at all, in sect. 26. But, although, in that clause, the provision is not expressly made, it is clear that the condition of complete registration, to be fulfilled by companies, under sect. 26, before they can exercise the powers there specified, extends to the railway companies

(*a*) 15 *M. & W.* 121.

in question; and it is also clear, on comparing that section with sect. 25, that the companies subject to the one were meant to be included in the other. So, in sect. 24, which imposes a penalty on the promoters of companies if they do certain acts before obtaining a certificate of provisional registration, railway companies requiring an act of parliament are not mentioned: yet, on comparing the clause with sect. 23, where they are named, there can be no doubt of the intention to include them in both. *Alderson* B. assumed, in *Young* v. *Smith* (*a*), that there was no clause relating to companies which required an act of parliament, after sect. 25: but sects. 58 and 66 refer to such companies. *Platt* B. observed, in the same case, that, "generally speaking, in the case of a railroad, complete registration is not necessary," because, by sect. 23, the company may act for twelve months under a provisional registration, and in the mean time obtain an act of parliament. But sect. 9 expressly regulates the manner in which a certificate of complete registration shall be taken out by such a company. And sect. 51, which is applicable as well to railway companies as to any other, entitles the holder of any share "in any joint stock company completely registered under this act" to demand a certificate of proprietorship. It was also said by *Platt* B. that "the 26th section, being of a penal nature, requires a strict construction." But it is remedial as well as penal. And, even if it were merely penal, "the most restricted sense" "is not, as a matter of course, to be adopted, as the true sense of the statute, unless it best harmonizes with the context, and

(*a*) 15 *M. & W.* 135.

stands best with the words and with the mischiefs to be remedied by the enactment." These are the words of Mr. Justice *Story* in *United States* v. *Winn* (*a*), and give a rule more than once judicially laid down and acted upon by that learned Judge, and agreeable to the principles on which, in modern times, the Courts are accustomed to construe statutes. The whole object of the statute must be looked at in construing the particular clause; and the object here was to prevent gambling transactions in all joint stock companies, whether formed for making railways or for other purposes. If there be an act of parliament with a saving repugnant to the rest of the act, the saving is void; *Jenk. Cent.* 5, p. 196, case 4 (*b*). Here, the exemption by the proviso of sect. 2, if not qualified, as to railway companies, by the exception, would be contradictory to other clear provisions of the act. Secondly, the replication merely states that "the purposes of the said joint stock company and the said railway intended to be executed by them could not be carried into execution without" the authority of parliament. To make the exempting clause applicable, there should have been a clear statement that the railway could not be carried into execution without such authority: here the averment may be construed as applying to the purposes only. *Fletcher* v. *Crosbie* (*c*) shews the insufficiency of the present allegation. It is not a matter of course that a railway should require the authority of parliament. If all the landowners on the line consented, an act would not be necessary. Railways have, in fact, been constructed, in the North of *England*, by

(*a*) 3 *Sumner's Reports &c. in the Circuit Court of the United States, &c.* 209. 212. *Boston*, 1841.

(*b*) The second case so numbered, 3d ed.

(*c*) 9 *M. & W.* 252.

the owners of collieries and other lands, without parliamentary authority. Thirdly, it is unusual and improper to aver that the company was for executing a railway within the intent &c. of "part of" a statute: at least it should be shewn what part is meant. No issue can be taken on such an averment.

(He also relied upon the other points stated in the demurrer.)

W. R. Cole, contrà. The first question is, whether this Court will over-rule *Young* v. *Smith* (*a*). That case has been more than once acted upon since the decision; and it is not likely that the clauses now relied upon for the defendant should have been overlooked. The argument on the other side annuls the proviso of sect. 2 referred to in the replication, and would shew that railway companies, even though they could not be finally established without act of parliament, must be completely as well as provisionally registered. No clause in the act establishes more than that such companies may, if they think proper, obtain complete registration. Sects. 23 and 24, so far as they bear on this case, shew that the promoters of railway companies may sell scrip after provisional registration, but not before. Sect. 26 relates to the sale not of scrip but of shares. That clause has been rightly construed by the Court of Exchequer. It is true that railway companies are expressly mentioned in sect. 25: but the inference is that, where that is not done, they are not contemplated. The effect of sect. 25 is only that, if a railway company which cannot carry its object into execution without act

(*a*) 15 *M.* & *W.* 121.

of parliament thinks proper to obtain complete registration, it shall still not have authority to make contracts otherwise than conditionally upon obtaining its act, or to exercise certain other powers which are enumerated; but that, subject to the specified exceptions, it may do all that may be done by any other company completely registered, and all acts necessary for obtaining its act of parliament; and that, on the passing of such act, all provisions and regulations of the present act, applying to such company, shall cease. But, by sect. 26, the companies there mentioned, even if they should have obtained an act of parliament, would remain subject to prohibition under the earlier clauses, until they should be completely registered. Therefore, as *Alderson* B. pointed out in *Young* v. *Smith* (*a*), sects. 25 and 26, if they both applied to railway companies requiring an act of parliament, would contradict each other; and such companies are not within sect. 26. Sect. 4 expressly notices companies "for executing any such work as aforesaid under the authority of parliament," and shews that where they are contemplated the legislature deems it proper to mention them. The same remark applies to sect. 7, where it is declared not lawful "for any joint stock company hereafter to be formed for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of parliament, or for any other purpose, to act otherwise than provisionally in accordance with this act until such company shall have obtained a certificate of complete registration;" and this affords an instance in which it is "specially provided" (according to sect. 2)

(*a*) 15 *M. & W.* 128

that the present act shall extend to railway companies requiring the authority of parliament. The language of sects. 10, 11 and 14 shews that complete registration by companies incorporated under the authority of parliament is not expected to be universal. The fee on complete registration (5*l.*, and one shilling additional on every thousand pounds of declared capital (*a*)) would be extravagant if made a necessary charge on the great capitals of railway companies. Sect. 26 requires, not only that the company there mentioned shall have obtained complete registration, but that the shareholder shall have been registered; a necessity not imposed by any other part of the statute on the holders of shares in companies under act of parliament. Sect. 26 is penal, whatever be the ulterior object, and must be construed strictly. The second and other grounds of demurrer are not maintainable.

Pashley, in reply. Sects. 23 and 24 do not authorize the selling of scrip, but only the allotting of shares and receipt of deposits. (He also mentioned, after the close of the argument, Ex parte *Barton*, in *Re Charles* (*b*).)

It being intimated that other cases similar to the above were depending, the Court deferred giving judgment until those should have been heard.

Cur. adv. vult.

LOONIE *against* OLDFIELD.

ASSUMPSIT for work and labour done by plaintiff as defendant's broker and agent in and about the pur-

(*a*) Sect. 21. (*b*) 1 *De Gex*, 316

chasing for defendant of divers shares and scrip certificates of shares in divers railway undertakings, and otherwise in relation thereto, at defendant's request, and commission due and payable by defendant to plaintiff in respect thereof: for money paid: for interest: and on an account stated.

Plea (2): as to 1*l.* 11*s.* 3*d.*, parcel of the money in the first count mentioned, and as to 75*l.* parcel of the money in the second count mentioned, and as to 76*l.* 11*s.* 3*d.* parcel of the money in the last count mentioned: that, after the passing of an act &c. (7 & 8 *Vict. c.* 110.), and after 1st *November* 1844, and before the commencement of this suit, to wit 28th *October* 1845, plaintiff, as the broker or agent of defendant, on his retainer and at his request, purchased for and on account of defendant divers, to wit twenty five, scrip shares, to wit certain rights and interests to and in twenty five shares of and in a certain joint stock company called *The London, Worcester, Rugby and Oxford Railway Company*, to wit at and for the price or sum of 75*l.*; the formation of which said company was commenced after 1st *November* 1844, to wit on 2nd *November* 1844; and which said company, before and at the time of such purchase, was a joint stock company established, in that part of *Great Britain* and *Ireland* called *England*, for the purpose of profit, and then was and still is a joint stock company, according to the definition and within the provisions and true intent and meaning of the said act of parliament; that is to say, a partnership whereof the capital was then agreed and intended to be divided into shares, and so as to be transferable without the express consent of all the copartners therein, and not then being a banking

company, school or scientific or literary institution, or a friendly society, loan society or benefit building society, nor a company incorporated by statute or charter, nor a company authorized by statute or letters patent to sue and be sued in the name of some officer or person. That the said sum of 75*l.*, parcel &c., was so much money paid by plaintiff for defendant, and at his request, in and about and for the said purchase of such last mentioned shares, and as and for and in payment of the said price thereof, on such purchase as aforesaid, and not otherwise; and that the said sum of 1*l.* 11*s.* 3*d.*, parcel &c., was and is claimed by plaintiff from defendant, for and in respect of the work and labour of plaintiff as the broker and agent of defendant as aforesaid, in and about the said purchase of the said last mentioned shares, and for commission and reward due and payable from defendant to plaintiff in respect thereof, and not otherwise; and that the said sum of 76*l.* 11*s.* 3*d.*, parcel &c., being the amount of the said two several sums of 75*l.*, parcel &c., and of 1*l.* 11*s.* 3*d.*, parcel &c., was and is the same debt as such amount thereof, and that the said account stated as in the last count mentioned was, as to the said sum of 76*l.* 11*s.* 3*d.*, parcel &c., stated of and concerning and relating to the said two several sums of 75*l.*, parcel &c., and of 1*l.* 11*s.* 3*d.*, parcel &c., and not of or concerning or relating to any other debt, sum, claim, matter, cause or thing whatsoever. That, at the time of such purchase, the said joint stock company had not been completely registered, nor had obtained any certificate of complete registration according to the provisions of the said act in that behalf; and that no authority or act of parliament had then been obtained, by or on behalf of the

said company, for the carrying into execution or executing any work or works by the said company, or in anywise relating to or authorizing the said company: of all which premises, in this plea aforesaid, plaintiff, at the time of the said purchase, had notice. Which said purchase was and is contrary to the form of the said act of parliament so made and passed as aforesaid. Verification.

Replication. That the said company, in the plea mentioned, was and is a company for executing a work which cannot be carried into execution without obtaining the authority of parliament; that is to say a railway. Verification.

Special demurrer, assigning for cause, that it is not stated in, nor does it appear from, the replication why the work therein mentioned cannot be carried into execution without obtaining the authority of parliament; nor is it stated in, nor does it appear from, the replication that, at the times when the said supposed causes of action as to which the second plea is pleaded accrued, or at any of them, the said work could not be carried into execution without obtaining the authority of parliament.

Joinder in demurrer.

The case was argued in this vacation (*a*).

Cowling for the plaintiff. First: the allegation, in the replication, that the work is one "which cannot be carried into execution without obtaining the authority of parliament; that is to say a railway," is uncertain. If the impossibility be physical, it cannot be removed by act

(*a*) *June* 13th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

of parliament: if it be legal, then the company is formed for purposes which are at present illegal. The words used are indeed those of sect. 2: but in pleading it is necessary to shew how the case is within the legislative provision. The insulated words may not bear the meaning which the same words bear when read in connection with the rest of the act. The words, as used in sect. 2, seem to apply only to cases where it is intended to obtain the authority of parliament. That is clearly the sense contemplated in sect. 4, which prescribes the steps to be taken before obtaining the act: and the same inference arises from sects. 7, 9. It has been held that a conviction is not necessarily good because it uses the words of a statute, unless it shew facts bringing the case within the intention of the legislature (*a*). If issue were joined on this allegation, what would the jury have to try?

Next, even if the replication be not insufficient for the reasons given, it offers no substantial answer to the plea, which shews a good defence. It was not necessary to negative the proviso of sect. 2; note (2) to *Thursby* v. *Plant* (*b*); and *Elliott* v. *Blake* (*c*) and *Hotham* v. *The East India Company* (*d*), there cited. For the plea would be good, although it incorporated the matter in the replication. The matter in the plea brings the case within the provision of sect. 26, and therefore within the exception to the proviso in sect. 2, "except as hereinafter specially provided." The proviso therefore is inapplicable, and sect. 26 applies. (He then pro-

(*a*) See *Seth Turner's case*, antè, p. 80.; *Fletcher* v. *Calthrop*, 6 *Q. B.* 880.

(*b*) 1 *Wms. Saund.* 233 *a.* (6th ed.)

(*c*) 1 *Lev.* 88.

(*d*) 1 *T. R.* 638. 645.

ceeded to argue in support of this view, by comparing and classifying the clauses of the statute; and he commented on *Young* v. *Smith* (*a*). The judgment of the Court having been confined to the form of the replication, this part of the argument is not further detailed.)

No counsel appeared for the plaintiff.

Cur. adv. vult.

EADON *against* BRANSON.

ASSUMPSIT. The second count was for money paid by plaintiff for defendant.

The defendant, in different pleas, as to certain sums, parcels of the sums mentioned in the second count, pleaded pleas substantially the same as that in *Loonie* v. *Oldfield* (*b*); and the plaintiff replied substantially as in that case.

General demurrer. Joinder.

There were other counts upon which the pleadings were similar to the above, so far as regards the point decided.

The case was argued in this vacation (*c*).

Pashley, for the defendant, after referring to the arguments in the two preceding cases, pointed out that the word "further," which, in sect. 26, introduces the prohibition of transferring, shewed that that prohibition was applicable to the companies affected by the preceding part of the section: that, in the preceding part, the words are

(*a*) 15 *M. & W.* 121. (*b*) Antè, p. 575.

(*c*) *June* 13th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

"subject nevertheless to the provisions of this act, and of the deed of settlement of the company *or other* special authority;" and that, by sect. 3, "special authority" includes a "local and personal act of parliament, by which powers are conferred or regulations prescribed with reference to any individual company." This seems to shew that the prohibition includes railway companies requiring acts of parliament. It is true that a railway company may possibly be so formed as not to require complete registration; since, if the standing orders are complied with, an act of parliament may be obtained giving all necessary powers. [*Patteson* J. From sect. 25, it appears that the legislature supposed there might be a complete registration of a railway company requiring an act.] Sects. 9, 10 and 11 appear also to be framed on the assumption that this will take place. If sect. 26 do not apply to railway companies, neither will sects. 17, 19; yet the policy in pursuance of which these sections are inserted seems mainly applicable to railway companies. In *Young* v. *Smith* (*a*) the Court of Exchequer treated the provision of sect. 26 as penal. It is so in form; but in effect it is remedial. The statutes against gambling, and others, though they impose penalties, are still remedial; *Bones* v. *Booth* (*b*), *Hyde* v. *Cogan* (*c*), *Holloway* v. *Hewett* (*d*), *Earl Spencer* v. *Swannell* (*e*). It will be objected that the plea ought to negative the proviso: but that this is unnecessary appears from *Spieres* v. *Parker* (*g*), *Shaw* v. *Poynter* (*h*), *Doe dem. Payne* v. *The Bristol and Exeter Railway Com-*

(*a*) 15 *M. & W.* 121. (*b*) 2 *W. Bl.* 1226.
(*c*) 2 *Doug.* 699. 705.
(*d*) Cited in *Lord Selsea* v. *Powell*, 6 *Taunt.* 298. *S. C.* 2 *Selw. N. P.* 1317. 11th ed.
(*e*) 3 *M. & W.* 154.
(*g*) 1 *T. R.* 141.
(*h*) 2 *A. & E.* 312.

pany (*a*) (recognized in *Taylor* v. *Clemson* (*b*)), and *Thibault* v. *Gibson* (*c*).

Martin, contrà. The legislature clearly had in contemplation two distinct classes of joint stock companies, shares in which might be legally transferred; namely, companies under a specific act, and companies fulfilling the particular requisites of stat. 7 & 8 *Vict. c.* 110. Railway companies which were to have specific acts were not the object of the prohibition. If, in sect. 2, there be any distinction between the phrases "expressly applied" and "specially provided," the latter is that which requires the more precise provision. But there is nothing like a special provision prohibiting the transfer of shares in railway companies which are to have an act of parliament. Sect. 26 merely follows sect. 25, as sect. 25 follows sect. 24, so as to include the cases of provisional and complete registration. (He then went into a comparison of the clauses, like that in the argument for the plaintiff in *Lawton* v. *Hickman* (*d*).) Further, even if the prohibition in sect. 26 apply here, it does not necessarily follow that the action will not lie. The contract of sale indeed could not be enforced: but, if the contract be simply void, and not illegal, the purchase money might be recovered after the sale was executed.

Pashley, in reply, as to the last point, referred to *Bartlett* v. *Vinor* (*e*), *Cope* v. *Rowlands* (*g*), and *Ewing* v. *Osbaldiston* (*h*).

Cur. adv. vult.

(*a*) 6 *M. & W.* 320. 340.
(*b*) 11 *Cl. & F.* 610. 648.
(*c*) 12 *M. & W.* 88.
(*d*) Antè, p. 568, &c.
(*e*) *Carth.* 251.
(*g*) 2 *M. & W.* 149.
(*h*) 2 *Myl. & Cr.* 53.

O'NEIL the younger, and NOSWORTHY, *against* BRINDLE.

ASSUMPSIT for work, labour and commission.

Plea, as to 12*l.* 10*s.*, parcel of the sum in the first count mentioned: actionem non, because the promise in the first count, so far as it relates to the said sum of 12*l.* 10*s.*, was made in consideration of the said work &c., that is to say, work of plaintiffs before then done as the agents of defendant, to wit on &c., in and about the purchasing of divers, to wit one hundred, shares, commonly called scrip shares, then about to be issued, in a certain partnership and joint stock company for making a certain railway to be called *The Sheffield and Lincoln Railway*, the formation of which partnership and joint stock company commenced after 1st *November* 1844, mentioned in the statute hereinafter mentioned, to wit on 1st *January* 1845, and for no other consideration whatsoever. That the capital of the said partnership and joint stock company, at the time when the same work was so done by plaintiffs as aforesaid, was proposed and agreed to be divided, and was to be divided, into shares, and so as to be transferable without the express consent of all the copartners in and of the said copartnership and joint stock company; and that the said copartnership and company then was and is a copartnership and company required to be registered, according to the provisions in that behalf contained in the statute made &c. (7 & 8 *Vict. c.* 110.), in the office in the said act provided for the registration of joint stock companies: and that the said purchase of the said one hundred shares by plaintiffs for defendant was made and effected, and the said work of the plaintiffs in and about the said purchase

of the said shares was done and performed, by the plaintiffs as aforesaid, before the said partnership and joint stock company had obtained a certificate of complete registration as by the said statute required, or been incorporated by any statute or statutes made and passed for the incorporation of such partnership and joint stock company; as they the said plaintiffs, at the time when the said purchase was so made and effected, and the said work of the plaintiff was so done and performed in and about the said purchase of the same shares as aforesaid, well knew; whereby the promise in the first count mentioned, so far as the same relates to the said 12*l.* 10*s.*, parcel &c., was and is void, and in no wise obligatory upon the defendant. Verification.

The plaintiff replied over: and defendant demurred to the replication.

Joinder in demurrer.

(There were other pleadings raising the same question as the pleadings above stated.)

The case was argued in this vacation (*a*).

Birnie, for the defendant, relied on the same arguments as were urged in the preceding cases.

Cowling, contrà. The pleas are bad. They ought to negative the exceptions in sect. 2: at any rate those in the early part of the section, "banking companies," &c. The averment that the company was one "required to be registered" merely asserts an inference of law. This is not cured by pleading over: it would be bad after

(*a*) *June* 13th. Before Lord *Denman* C. J. and *Patteson* J. *Williams* J. left the Court during the argument.

verdict; *Farnworth* v. *The Bishop of Chester* (*a*); and is so on demurrer to a subsequent pleading; *Fancy* v. *Scott* (*b*). (He also argued in support of the replication.)

Birnie, in reply. The general allegation is sufficient on general demurrer, and therefore cannot be objected to on demurrer to the replication. The plea is perhaps argumentative; but that objection should have been shewn for special cause.

Cur. adv. vult.

Ray *against* Hirst.

Debt. The first count was on a bill of exchange drawn by plaintiff, payable to himself or order, and accepted by defendant.

Plea (4): that, before the accepting, and after 1st *November* 1844, to wit on 1st *June* 1845, plaintiff, as the stockbroker and agent of and for defendant, illegally, and contrary to the form of the statute, purchased of a certain person, whose name is to defendant unknown, certain shares, to wit fifty shares, of 50*l.* each, in the capital stock of a certain joint stock company established in *England*, to wit a joint stock company called *The York and Carlisle Railway Company*, at and for a certain price, to wit 112*l.* 10*s.*: and the said person then sold and transferred to plaintiff, as such broker and agent, the said shares, by then delivering to him the scrip certificates of the said shares, contrary to the form of the statute in such case made; the said person then claiming to be entitled to the said shares; and the formation of the said joint stock company having

(*a*) 4 *B. & C.* 555. (*b*) 2 *Man. & Ry.* 335.

been commenced after 1st *November* 1844, to wit on 1st *May* 1845; and the said joint stock company not having at the time of the said purchase and sale obtained a certificate of complete registration, as required by the statute in such case made. That plaintiff further drew, and defendant accepted, the bill of exchange for and in consideration of 57*l.* 4*s.* 6*d.*, parcel of the price of the said shares so illegally purchased and sold, and to secure to plaintiff the payment thereof, and for and upon no other value or consideration. Verification.

Special demurrer, assigning for cause (among others), that the statute in the plea mentioned does not comprehend or render illegal the sale or disposal of shares or interest in a railway company which cannot be carried into execution without obtaining the authority of Parliament; nor is such sale illegal: and that the plea should have shewn with certainty and precision that the company mentioned therein was not such a railway company as required the authority of Parliament. That the plea should have stated, with certainty and precision, what was the nature and purpose of the said joint stock company, and that it was comprehended within the meaning of the word "joint stock company" as defined in the said statute: that it is not sufficient to state the title and purpose of the company under a videlicet; and that it is consistent with the plea that the said company was a banking company, or any other company excepted by the said statute, and not included in the provisions thereof.

Joinder in demurrer.

There were also other counts, which led to pleadings raising the same point. The case was argued in this vacation (*a*).

(*a*) *June* 13th. Before Lord *Denman* C. J. and *Patteson* J.

RAY v. HIRST.

Sir *John Bayley*, for the plaintiff, relied on the objections stated in the demurrer, and referred to *Davies* v. *The King* (*a*).

Hawkins was heard for the defendant.

Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*June* 27th), delivered the judgment of the Court in the five cases.

LAWTON *against* HICKMAN.

To a declaration for goods and chattels sold and delivered, and money due on an account stated, the plea is, that the goods and chattels were and are shares in the capital stock of a joint stock company, illegally sold and delivered by the plaintiff to the defendant by the delivery of scrip certificates after 1st *November* 1844, contrary to the form of the statute; and that the account stated relates to the same illegal sale and delivery: the plea further states that the said company was, before and at the time of the said sale and delivery, a joint stock company established in *England* for the purpose of profit &c. (His Lordship here repeated the words of the plea, p. 564. antè), and not a banking company, school &c., and that it was a partnership whereof the capital was agreed to be divided into shares, so as to be transferable &c. (as in the plea, p. 564. antè): that it was not incorporated by charter or statute: that the formation of it was commenced after 1st *November* 1844: that it had not, at any time before the said sale and delivery, obtained a certificate of complete registration: and that the plaintiff, before and at the

(*a*) 10 *B. & C.* 89.

time of the sale and delivery, claimed to be entitled to the said shares, and sold and delivered them to the defendant as being so entitled.

The replication then seeks to bring the company within the proviso contained in the second section of the act, alleging that it was established for the purpose of making and maintaining a certain railway, to be called *The Grand Union Railway*, under the authority of an act of parliament to be obtained for that purpose, with the usual powers to take land for the purposes of the said railway, to take tolls, and other powers usually granted by parliament to railway companies; and that the purposes of the said company and the said railway could not be carried into execution without first obtaining the authority of parliament; and that the company was a company for executing a railway within stat. 7 & 8 *Vict. c.* 110., containing the said proviso; and avers that, within twelve months next before the said sale and delivery, the said company was provisionally registered, and obtained a certificate of provisional registration, pursuant to that statute.

The specialde murrer assigns for causes: first, that the circumstance of the said company being established for the purposes in the replication mentioned did not make the sale legal. The second cause of demurrer is, that, consistently with the replication, the railway might be carried into execution without the authority of parliament, as the powers required for its execution are not specified; and that the description of the company in this respect is too general, and puts in issue matter of law. To this the answer is, that that description, following the words of the act, appears to us sufficient: that some of the objects of railway companies, for which the

authority of parliament is requisite, are set out in the replication: but, further, that we, like the Court of Exchequer, are so familiar with the nature of railway companies, that it would be irrational to decline taking judicial notice of them and the necessity for their obtaining such authority. A third cause of demurrer is, that the execution of a railway is not said to be the sole purpose of the company. But we think that this is not necessary. The proviso does not in terms require it to be for that sole purpose; and the Court will not assume that it will have been created for any other. This, indeed, is not impossible; but, if a railway company is challenged as illegal because it moreover contemplates some other purpose, that ought to be averred by those who so impeach it.

We think there is nothing in the last objection, that railway shares are not goods and chattels.

We revert now to the first cause of demurrer, which fairly raises the question, whether the circumstance, that the company was established for the execution of a railway requiring the authority of parliament, prevents the twenty-sixth section from rendering the sale of shares illegal.

Now that proviso is most remarkable in its terms, as they directly prevent the act from attaching on any railway company which cannot be carried into execution without the authority of parliament, except as in the said act is specially provided. The act therefore does not operate upon such company at all, unless there is some special provision, and then only *as* may be specially provided.

This is not a proviso in the ordinary sense, something engrafted on a preceding enactment; but it is

something which prevents every enactment of the statute from operating on such companies, except in a particular case; and that case is not the occurrence of any extrinsic fact which must have been brought before the court by pleading, but it depends entirely on the contents of the act itself, which the Court is bound to examine and construe, and decide for itself whether a special provision is to be found within it, and whether such special provision applies to the matter in hand. The proviso must have the same force, in reference to every enactment, as if it were repeated at the close of each. Therefore, though the word "provided," and the position of the clause, would appear to bring it within the rule that, as a proviso, it ought to be specially pleaded, it is in truth an exception, or rather a statutory declaration overriding the whole act, that to such companies the respective enactments shall not extend, unless we discover in the act the special provision which would make them applicable. We have carefully gone through the sections in which special provisions are made with respect to railway companies, several of which, the 4th, 7th and 9th, were not brought to the notice of the Court of Exchequer in the argument in the case of *Young* v. *Smith* (*a*). But the result of our investigation is that they are not special provisions which by necessary implication apply the 26th section to railway companies. The 25th section was fully commented upon, and was said to prove that the 26th must have been intended to apply to railway companies as well as others; and there is some weight in the argument from intention, though Mr. Baron *Alderson* thought that dif-

(*a*) 15 *M. & W.* 121.

ferent classes of companies are contemplated by the two sections. But, if we consider the 26th section, making it penal to deal in shares before complete registration, to be accompanied with the paramount enactment that it shall extend to no railway companies, except as by the act is specially provided, we are driven to search for this special provision, and, finding none, to say that that section does not extend to them.

Whether this was intended by the legislature, we do not profess to give any confident opinion. That they meant to deal differently with ordinary joint stock companies and with railway companies, can admit of no doubt. A special provision to the effect of invalidating sales of shares before complete registration may have been omitted through an oversight, or possibly from design. It is enough for a Court of law to say that it is omitted: and the consequence is that the plaintiff is entitled to our judgment.

Judgment for plaintiff.

LOONIE *against* OLDFIELD.

THE declaration was for money paid by *Loonie* as a broker in purchasing shares and scrip certificates in certain *railway undertakings*, and on an account stated. Plea: that, after stat. 7 & 8 *Vict. c.* 110., and after 1st *November* 1844, plaintiff, as broker and agent of defendant, purchased on his account scrip shares in a certain *joint stock company called The London, Worcester, Rugby and Oxford Railway Company*, the formation of which was commenced after the said 1st *November*, and which was established in *England* for the purpose of profit,

and which was and is a joint stock company according to the definition and within the provisions and true intent and meaning of the said act (setting out the particulars and negativing the exception in section 2); and that the money was advanced, and the commission earned, and the account stated, in and about the purchase of such shares before complete registration of the said company, and without any certificate of complete registration, and no authority of parliament had been obtained for carrying into execution any works of the said company: of all which the plaintiff had notice: which purchase was contrary to the statute. Replication: that the said Company was a company for executing a work which cannot be carried into execution without obtaining the authority of parliament.

This replication is demurred to, because it does not shew why the works cannot be carried into execution without the authority of parliament. But we are of opinion that it sufficiently appears, on the whole record, to be a railway company; and we may properly take notice that a railway company cannot be carried into execution without the authority of parliament, as we have already stated in the former case.

Judgment for plaintiff.

EADON *against* BRANSON.

A SIMILAR replication to a similar plea is demurred to for the same cause.

Judgment for plaintiff.

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RAY
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RAY *against* HIRST.

THE plaintiff is clearly entitled to judgment, because the exceptions in sect. 2 are not negatived in the plea.

O'NEIL *against* BRINDLE.

O'NEIL
v.
BRINDLE.

THE same judgment; because, though the plea avers that the Company was such a one as required to be registered under the act, it does not shew why, and is too general even on general demurrer.

Judgment for plaintiffs (*a*).

(*a*) See *Bousfield* v. *Wilson*, 16 *M.* & *W.* 185. Also, *Van Boven's Case* p. 669, post.

Saturday,
June 27th.

ROGERS *against* KENNAY.

Goods in the possession of *A.* having been taken in execution at the suit of *B.* against *C.* an interpleader issue was directed, to try whether *A.* (plaintiff in the issue) had any property in the goods as against *B.* (defendant in the issue):

Held, that the issue on plaintiff's part was maintained by shewing a lien on the goods for money due to him from *C.*

THIS was an interpleader issue, directed by a Judge, and the declaration, in assumpsit on a wager, stated the question between the parties to be: "Whether the plaintiff had any property, as against the defendant in this suit, in certain goods and chattels theretofore seized by the sheriff of *Essex* by virtue of a writ of fieri facias issuing out of the Court of Queen's Bench at *Westminster*, in a suit wherein the defendant in this suit was plaintiff, and one *William Rowe* was defendant." The now plaintiff averred "that he had some property in the said goods" "as against the said defendant in this suit" at the time of the seizure: the defendant, by his plea, maintained the negative: and thereon issue was joined.

On the trial, before *Coleridge* J., at the *Essex* summer

assizes, 1845, it appeared that *William Rowe*, having obtained an advance of money from the plaintiff, deposited the goods in question (building materials) on the plaintiff's premises as a security, and signed a memorandum addressed to the plaintiff, stating that, in consideration of plaintiff having given cash for several bills of exchange bearing *Rowe*'s signature, he, *Rowe*, deposited, with that memorandum, about 5000 slates, &c. (specifying the goods (*a*), which were stated to be then on plaintiff's land at *Maryland Point*, *Stratford*, *Essex*), "as collateral security for any sum of money now due or owing, or which may become due" &c., "by virtue of any bill of exchange" &c.; "and I further authorize you, on default or non-payment" &c., "to sell, by private or public sale, the whole of the foregoing articles named," "and account to me" &c. It was contended, on the plaintiff's part, that, under these circumstances, he had a "property" in the goods, as against the defendant, within the meaning of the issue. For the defendant, it was urged that the plaintiff had a lien only, and that the sheriff might sell the goods, subject to such lien. A verdict was found for the defendant, and leave given to move to enter a verdict for the plaintiff.

M. Chambers, in *Michaelmas* term 1845, obtained a rule nisi accordingly.

Pearson now shewed cause. The issue, here, whether the plaintiff had any "property," raises precisely the

(*a*) It was made a point, on the ensuing argument in Banc, that, after the agreement was entered into, different goods had been substituted (with the plaintiff's consent) for those specified; but the Court said it did not appear by the note of the learned Judge who tried the cause that this point had arisen at the trial. Nothing ultimately turned upon it. *Tapfield* v. *Hillman*, 6 *Man. & G.* 245., was cited.

same question as when a defendant in detinue pleads that the goods are not the goods of the plaintiff. It was said in *Lane* v. *Tewson* (*a*) (cited in moving for the present rule) that, under such a plea in detinue, lien might be shewn; but that is no longer considered to be the law; *Mason* v. *Farnell* (*b*) (recognized by this Court in *Whitehead* v. *Harrison* (*c*)), *Barnewall* v. *Williams* (*d*). In this respect the plea in detinue, denying property, differs from the plea of Not possessed in trover, where, the plaintiff's title depending on right of property and right of possession, the plea Not possessed puts both in issue; *White* v. *Teal* (*e*). In the present case, therefore, the question was whether the title to the goods was in the plaintiff; not whether he had or had not a lien upon them: nor was this material; for, according to the law laid down in 2 *Tidd's Pract.* 1003 (9th ed.), the sheriff had authority to seize the goods, subject to the lien.

M. Chambers, contrà. The question was, whether the plaintiff had "any property" in these goods as against the now defendant; and he proved a special property by lien. That was a property within the meaning of this issue: and it defeated the right to seize; for it has been expressly held, in *Legg* v. *Evans* (*g*), that goods on which one man has a lien cannot be seized under another's execution. In 2 *Tidd's Pract.* 1003, the doctrine laid down is that "goods pawned may be taken on an execution against the pawner, upon satis-

(*a*) 12 *A. & E.* 116, note (*a*).
(*b*) 12 *M. & W.* 674. 684.
(*c*) 6 *Q. B.* 423. 432.
(*d*) 7 *Man. & G.* 403.
(*e*) 12 *A. & E.* 106.
(*g*) 6 *M. & W.* 36.

faction of the pledge." Till then, the property of the pawnee is not devested. The nature of lien, as a special property, is illustrated by *Richards* v. *Symons* (*a*); and this Court there held that in trover the plea denying property is supported by proof that defendant has a property in the nature of lien; the question raised by the plea being whether the plaintiff has any property as against the defendant, and the right proved being a special property in the defendant as against the plaintiff. It is true that, in *Mason* v. *Farnell* (*b*), a distinction was drawn between trover and detinue as to the effect of a plea of Not possessed: but the language of the Court, there, is in favour of the present plaintiff; for it is said: "In order to maintain detinue, it is not necessary that he" (the plaintiff) "should have the entire property in the goods. A plaintiff entitled to a share of a chattel may maintain this action. That was decided by the Queen's Bench in *Broadbent* v. *Ledward* (*c*)." (*Pearson* suggested that *Legg* v. *Evans* (*d*) differed from the present case, because the action there was not between parties contesting the title to property, but between the sheriff and a party claiming right of possession as against him.)

Lord DENMAN C. J. *Legg* v. *Evans* (*d*) was a case much considered, and is directly in point.

PATTESON J. *Parke* B. said there (*e*) that "any person having a right to the possession of goods may bring

(*a*) 8 *Q. B.* 90.
(*b*) 12 *M. & W.* 674.
(*c*) 11 *A. & E.* 209.
(*d*) 6 *M. & W.* 36.
(*e*) P. 41.

trover in respect of the conversion of them, and allege them to be his property:" and lien, as an immediate right of possession, was held to constitute such a property. The other questions which have been touched upon do not arise in this case.

WILLIAMS J. concurred (*a*).

Rule absolute.

(*a*) *Wightman* J. was sitting at Nisi Prius.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM AND VACATION,

X. VICTORIA.

The Judges who usually sat in Banc in this Term and Vacation were,

Lord DENMAN C. J. — WIGHTMAN J.
COLERIDGE J. — ERLE J.

MEMORANDA.

IN last *Trinity* vacation Sir *Frederick Thesiger* resigned the office of Attorney General, and Sir *Fitzroy Kelly* that of Solicitor General, to Her Majesty: and, in the same vacation (*July* 3d), Sir *Thomas Wilde* Serjt. was appointed Attorney General, and *John Jervis*, of the *Middle Temple*, Esquire, Solicitor General.

In the same vacation, Sir *Nicholas Conyngham Tindal*, Lord Chief Justice of the Common Pleas, died (*July* 6th): and Sir *Thomas Wilde*, Attorney General, was appointed Lord Chief Justice of that Court.

John Jervis, Esquire, Solicitor General, was thereupon promoted to the office of Attorney General; and *David Dundas*, of the *Inner Temple*, Esquire, was appointed Her Majesty's Solicitor General. They afterwards received the honour of Knighthood.

In the same vacation Mr. Justice *Williams* died (*September* 14th): and thereupon Mr. Justice *Erle* was removed from the Court of Common Pleas and appointed a Judge of the Queen's Bench. And *Edward Vaughan Williams*, of *Lincoln's Inn*, Esquire, was appointed a Judge of the Court of Common Pleas, having first been promoted to the degree of Serjeant at law, when he gave rings with the motto "*Legum servi, ut liberi.*"

In this vacation, also, Mr. Serjt. *Talfourd* and Mr. Serjt. *Manning* were appointed Her Majesty's Serjeants at law. And

Mr. Serjt. *Murphy* and Mr. Serjt. *Byles* received patents of precedence, the former to take rank next to *A. Hayward*, Esq., the latter next to Mr. Serjt. *Murphy*.

In the same vacation, *Joseph Humphry*, Esquire, *James Bacon*, Esquire, and *Spencer Horatio Walpole*, Esquire, all of *Lincoln's Inn*, and *John Rolt*, of the *Inner Temple*, Esquire, were appointed Her Majesty's counsel.

And, in the present *Michaelmas* term, *Charles Buller*, of *Lincoln's Inn*, Esquire, received the same promotion.

RULE OF COURT.

Michaelmas term, 10 *Victoria.*

November 16th, 1846.

It is hereby ordered that so much of the table of fees signed by the Judges and ordered to be enrolled on the 20th *December* 1837, purporting to be made pursuant to the statute 1 *Victoria*, *c.* 55., as relates to process at the suit of the Crown, be annulled.

(Signed)

Denman.	T. Coltman.
Thomas Wilde.	R. M. Rolfe.
Fred. Pollock.	W. Wightman.
J. Parke.	W. Erle.
E. H. Alderson.	T. J. Platt.
J. Patteson.	E. V. Williams.
J. T. Coleridge.	

Laforest *against* Wall.

Tuesday, November 3d.

Assumpsit. The second count of the declaration stated: That one *Eugene Clifton*, on &c., made his bill of exchange, and directed the same to

To assumpsit by indorsee against acceptor of a bill, defendant pleaded: That the bill was accepted for the drawer's accommodation; that, although, at the time of action brought, plaintiff held the bill as the owner thereof, yet he did not hold it for any value; and that, except as in this plea aforesaid, there never was any value, consideration, purpose or reason for defendant's accepting the bill, or paying or agreeing to pay the amount to the drawer. Plaintiff replied De injuriâ: to which replication the defendant specially demurred. A Judge at chambers ordered the demurrer to be set aside as frivolous.

This Court, on motion to rescind the order, refused to interfere.

Semble, that the replication was good.

defendant, and thereby required him to pay to the order of *E. Clifton* 149*l.*, four months after date, which period had elapsed &c.; and defendant accepted the said bill; and *E. Clifton* indorsed the same to plaintiff: notice to defendant, and promise by him to pay. There were similar counts (3d and 4th) on other bills drawn by *Clifton* on defendant, payable, respectively, to the order of plaintiff and to the order of *Clifton*, accepted by defendant, and indorsed by *Clifton* to plaintiff. Breach, nonpayment, whereby plaintiff was obliged to pay &c.

Plea. That the said bills of exchange were respectively accepted by defendant at the request and for the accommodation of the said *E. Clifton:* and that, although, at the time of the commencement of this suit, plaintiff held the said bills of exchange as the owner thereof respectively, yet he the plaintiff did not so then hold the said bills respectively for any value whatever. And that, except as in this plea aforesaid, there never was any value, consideration, purpose or reason for the defendant's accepting the said bills respectively, or paying or agreeing to pay the amounts of the same respectively, or any part of those amounts respectively, to the said *E. Clifton.* Verification.

Replication: De injuriâ.

There were other pleadings, which it is unnecessary to state.

The defendant demurred specially, on grounds which will appear by the subsequent motion. *Pollock* C. B., on summons and hearing at chambers, ordered the demurrer to be set aside as frivolous.

Bovill now moved for a rule to shew cause why the order should not be rescinded. It is laid down

by the Court of Exchequer Chamber, in *Salter* v. *Purchell* (*a*), that De injuriâ applies where the facts pleaded shew "that, at the time the act complained of was done, it was done under circumstances which make it excusable or justifiable in the eye of the law;" but not where the plea is grounded "upon matter of discharge and extinguishment of" a "right of action." There may be an intermediate case between those put in *Salter* v. *Purchell* (*a*). The plea may allege matter which is not excuse, within the rule laid down in *Crogate's Case* (*b*), and is not exactly matter of discharge, but which operates as a bar at the time of action brought, and to which De injuriâ is inapplicable. The matter of excuse, to be met by that replication, must be strictly excuse, intervening between the time when the promise was made and the time for performance. The words "without the cause," here, are out of place; for no "cause" is alleged in the plea. [*Wightman* J. The cause is the holding without value given.] A cause which would have prevented the right of action from ever accruing cannot be excuse. At least the demurrer is not frivolous.

Lord DENMAN C. J. It seems to me that this is a good replication. And I think that we ought not to interfere with the discretion which a Judge has exercised in setting aside the demurrer.

COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Rule refused (*c*).

(*a*) 1 *Q. B.* 209. 218. (*b*) 8 *Rep.* 66. *b.*

(*c*) See the next case.

The following case was decided in *Michaelmas* vacation, 1848.

[*Monday*, *December* 18th, 1848.]

Robinson *against* Little.

In an action by indorsee against acceptor, defendant pleaded that the bill was accepted for the accommodation of the drawer, and on the terms that, if he should negotiate it, the holder should deliver it to the drawer before or when it became due, to enable him to take it up; and that the holder should not retain it after it became due: averment that the drawer indorsed it to the plaintiff, who received it on those terms.

Replication, De injuriâ.

Held, on special demurrer, that the replication was correct, inasmuch as the plea admitted that some interest in the bill was transferred to the plaintiff, and, therefore, did not amount to an argumentative denial of the indorsement, but only to an excuse for not paying the bill to the plaintiff, though admitted to be holder and primâ facie entitled to sue.

ASSUMPSIT by indorsee against acceptor of a bill of exchange drawn by *James Dickenson*, payable to his order.

Plea, that the bill was accepted for the accommodation of *J. D.* the drawer, and that, at the time of the acceptance, it was agreed by and between *J. D.* and defendant that the said *J. D.* should hold the bill upon the terms that *J. D.* should take up and pay the bill when due, and that, if *J. D.* should negotiate or part with the same to any holder whomsoever, such holder should deliver the same to *J. D.* before or at the time when the same should become due, to enable *J. D.* to take up and pay the same to such holder; and that the bill should not be retained by any holder thereof after the same had become due: that thereupon defendant, to wit at the time aforesaid, delivered the bill to *J. D.* on the terms aforesaid, and *J. D.* then received the bill on such terms, and has never held the same on any other terms. And thereupon afterwards, to wit on &c., *J. D.* indorsed the bill to plaintiff, and plaintiff then had notice of the premises, and then received and has always held the bill upon the

terms aforesaid, and, after the bill became due, and before and at the commencement of this suit, held and retained, and still holds and retains, it, and sues thereupon in this action contrary to these terms: which is the same indorsement &c. Verification.

Replication: De injuriâ.

Special demurrer, assigning as causes, that the plea amounted to a denial of the indorsement, and was in discharge and not in excuse.

There was a second count on another bill, followed by similar pleadings.

The demurrer was argued at the sittings after *Michaelmas* term, 1848 (*a*).

Hugh Hill, for the defendant. This plea is not an excuse for not paying the bill to the plaintiff, admitting him to be indorsee, but an argumentative denial of the indorsement stated in the count. An indorsement means, not a mere writing of the name of the indorser, but such an indorsement as transfers a title to the bill; *Adams* v. *Jones* (*b*). Lord *Denman* C. J. there says: "This plea avers that the bill was indorsed in blank, and delivered to the plaintiff, not as indorsee, but as agent only for another to whom he was to deliver it, and who was the real indorsee. We think, therefore, that it is a constructive denial that the bill was indorsed to the plaintiff." So in *Marston* v. *Allen* (*c*) the Court of Exchequer decided that, on traverse of an indorsement, the meaning of the issue was whether or not the bill was trans-

(*a*) *December* 6th. Before Lord *Denman* C. J. *Patteson* and *Wightman* Js.

(*b*) 12 *A. & E.* 455.

(*c*) 8 *M. & W.* 494.

ferred by the indorsement. In *Hayes* v. *Caulfield* (*a*) it was not denied that this is so in an action by the indorsee against the indorser. In *Schild* v. *Kilpin* (*b*) the Court said: "What is the breach in this declaration? It is the nonpayment of the bill according to its tenor and effect. Now the payment according to the tenor and effect of the bill is a payment to the holder of the bill, *i. e.* to a person to whom it was originally made payable, or to whom it has been transferred by a valid indorsement and delivery." By an indorsement on the terms stated in this plea the bill was not transferred to the plaintiff; for he was not to retain it against the acceptor. The defendant might maintain trover for it; *Evans* v. *Kymer* (*c*). It is true that the plaintiff might have conferred a valid title upon a bonâ fide holder; but so might the holder in *Marston* v. *Allen* (*d*) or in *Jones* v. *Corbett* (*e*), where it was held that the plea amounted to an argumentative denial of the acceptance. [*Wightman* J. In *Jones* v. *Corbett* (*e*) there was not in point of fact an acceptance by the defendant who pleaded the plea. But here there was an indorsement in fact; and is it not valid so far as to transfer a right to sue the indorser?] It is no indorsement as against the party pleading.

Hance, contrà. The cases cited are all distinguishable. The plea in *Jones* v. *Corbett* (*e*) was a denial of agency to accept the bill. In *Schild* v. *Kilpin* (*b*) it was an express denial that the plaintiff was holder. In *Adams* v. *Jones* (*g*) and in *Marston* v. *Allen* (*d*) the

(*a*) 5 *Q. B.* 81.
(*b*) 8 *M. & W.* 673. 676.
(*c*) 1 *B. & Ad.* 528.
(*d*) 8 *M. & W.* 494.
(*e*) 2 *Q. B.* 828.
(*g*) 12 *A. & E.* 455.

indorsement was not intended to transfer any interest in the bill. Here it was intended to make the plaintiff holder against other parties; but, if the plea is true, the defendant has an excuse for not paying the plaintiff, though holder.

Many authorities shew that, when a plea to an action on a bill admits that the defendant is a party who has promised to pay the bill to the holder, and that the plaintiff is such a holder of the bill as could in general maintain an action against parties to the bill, but the plea states facts shewing that the plaintiff never had a right to sue the particular party who is defendant, these facts form an excuse for not performing, as to this plaintiff, the defendant's promise to pay the holder, and De injuria is a proper replication; *Isaac* v. *Farrer* (*a*), *Basan* v. *Arnold* (*b*), *Humphreys* v. *O'Connell* (*c*). The plea in the present case is at all events not stronger or more in denial than a plea alleging illegality or fraud: yet it is now settled that a plea of fraud is in excuse only; *Cowper* v. *Garbett* (*d*). The last case on the subject is *Bennett* v. *Bull* (*e*), in which all the cases are collected. If the indorsement was such as to transfer any interest in the bill, as against any party, the cases cited shew that the defendant would have failed on a traverse of the indorsement. Here it is clear on the facts stated in the plea that an interest was transferred as against the drawer. The plea admits a promise to pay the holder of the bill, and that the plaintiff was a holder of the bill, but sets up an excuse for not paying that particular holder. De injuriâ, therefore, is a proper replication.

(*a*) 1 *M. & W.* 65.; *S. C. Tyrwh. & G.* 281.
(*b*) 6 *M. & W.* 559.
(*c*) 7 *M. & W.* 370.
(*d*) 13 *M. & W.* 33.
(*e*) 1 *Exch. Rep.* 593.

ROBINSON v. LITTLE.

H. Hill was heard in reply.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

We are of opinion that the replication De injuriâ in this case is good. The declaration is by the indorsee against the acceptor of a bill of exchange, and is in the usual form. The plea states, in substance, that the bill was accepted for the accommodation of the drawer, who undertook to pay it when due, and further that, if he should negotiate or part with it to any holder, such holder should deliver it to him, the drawer, before or when it became due, to enable him to take it up, and should not retain it after it became due. It then states that the drawer indorsed the bill to the plaintiff with notice; and that the plaintiff received and always held the bill on the above terms. The question is whether this plea shews an excuse for nonpayment, or amounts to an argumentative denial of the indorsement by the drawer to the plaintiff.

The cases of *Adams* v. *Jones* (*a*) and *Marston* v. *Allen* (*b*) were much relied on by the defendant: but they are distinguishable from the present. In both those cases the supposed indorser's name was written on the bill, but he had not delivered the bill to the plaintiff as intended holder to take any interest; the facts specially set out were therefore properly held to be an argumentative denial of the indorsement. Here, on the contrary, the plea shews that the bill was indorsed to the plaintiff as holder, conveying and intend-

(*a*) 12 *A. & E.* 455. (*b*) 8 *M. & W.* 494.

ing to convey to him such interest as the drawer himself had and no more; that is, in effect, to make the plaintiff the legal indorsee and holder of the bill, but restricting him from enforcing it against the defendant the acceptor.

A plea, in an action by drawer against acceptor, that the bill was accepted for the accommodation of the drawer is manifestly a plea in excuse (*a*), and open to a replication De injuriâ; and this plea is in effect a similar one. The fallacy is in supposing that the averment of indorsement contained in the declaration necessarily, and at all events, means such an indorsement as gives a right of action against the acceptor. Undoubtedly it does so mean primâ facie; but it may be answered by a plea shewing an indorsement in fact, but accompanied with such circumstances and conditions as to preclude the indorsee from enforcing it against the acceptor; in other words, to give the acceptor an excuse for not paying the amount to the indorsee: and the plea in question is exactly such an one.

Other cases were cited, but they are not in point: we may however observe that the most recent of them, *Washbourn* v. *Burrows* (*b*), *Bennett* v. *Bull* (*c*), *Mortimer* v. *Gell* (*d*), all go to shew that the replication De injuriâ is not now narrowed so much as it appears to have been at first after the New Rules. We may also advert to the case of *Herbert* v. *Sayer* (*e*), where the Court held the replication good to a plea very much involving the same point as the present case.

Judgment for plaintiff (*g*).

(*a*) See *Laforest* v. *Wall*, antè, p. 599.
(*b*) 1 *Exch. R.* 107.
(*c*) 1 *Exch. R.* 593.
(*d*) 4 *C. B.* 543.
(*e*) 5 *Q. B.* 965.
(*g*) Reported by *Colin Blackburn* Esq.

Tuesday, November 3d.

Bromage and Another *against* Vaughan and Another.

In an action by indorsee against indorser of a bill of exchange payable at *The London Joint Stock Bank* in *London*, notice of dishonour was proved, describing the bill as payable at *The London and Westminster Bank*.

Held no ground of nonsuit, the notice being accurate in all other respects, and there being no proof that defendant had been misled.

ASSUMPSIT by indorsees against indorsers of a bill of exchange, accepted payable at "The *London Joint Stock Bank* in *London*." The count averred presentment at "The *London Joint Stock Bank* in *London*," nonpayment, and notice to defendants. Plea (among others), that defendants had not due notice of the nonpayment of the said bill of exchange, in manner and form &c. Issue thereon.

On the trial, before *Wilde* C. J., at the last summer assizes at *Gloucester*, a letter was produced containing a notice of dishonour, which described the bill as payable at "*The London and Westminster Bank*:" and it appeared that there was a bank of that name in *London*, distinct from "The *London Joint Stock Bank*," where, in fact, the bill was payable. On this ground the notice was objected to: and *Wilde* C. J. reserved leave to move to enter a nonsuit. Verdict for plaintiffs.

Whateley now moved accordingly (*a*), and stated that he had no direct authority on the point, but cited *Furze* v. *Sharwood* (*b*).

Cur. adv. vult.

Lord Denman C. J., on a subsequent day of the term (*November* 16th), delivered the judgment of the Court.

(*a*) Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.
(*b*) 2 *Q. B.* 388.

This was an action against an indorser of a bill of exchange: and the defendant has moved for a rule nisi to enter a nonsuit in case the notice of dishonour was insufficient. The notice described the bill correctly as to dates and amount and parties, but stated it to be made payable at the *London and Westminster Bank*, whereas it was made payable at the *London Joint Stock Bank*.

If a misdescription is not considered such as would mislead the defendant in respect of the bill intended, the notice is not vitiated thereby: *Stockman* v. *Parr* (*a*). Upon that principle we are of opinion that the notice in this case is valid, notwithstanding the mistake. The Lord Chief Justice informs us that there was no evidence that the defendant had been misled: and the rule is not granted.

Rule refused.

(*a*) 11 *M. & W.* 809.

KEMPE *against* GIBBON.

Monday, November 3d.

COVENANT on a deed of *October* 1815, whereby a loan was secured on certain *West India* property, and the defendant covenanted therein to pay principal and interest on 1st *November* 1816: breach, non-payment.

Plea. That the cause of action did not accrue within twenty years. Replication, that the cause &c. did accrue within twenty years. Issue thereon.

To a declaration in covenant for non-payment of money, defendant pleaded that the cause of action did not accrue within twenty years. Replication that it did accrue within &c.

Held, under stat. 3 & 4 *W.* 4. *c.* 42. *ss.* 3, 5., that plaintiff could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years.

On the trial, before *Wilde* C. J., at the last *Gloucestershire* assizes, it appeared that the action had not been commenced within twenty years of the occurrence of the breach: but the plaintiff, to support the traverse in the replication, put in a letter from the defendant, written within the twenty years, which, as it was contended, contained an acknowledgment of the debt. On the part of the defendant, it was objected, first, that the letter did not amount to such an acknowledgment; but, secondly, that it could not be put in evidence under the traverse, and that, under sect. 5 of stat. 3 & 4 *W.* 4. *c.* 42., it ought to have been specially replied. The Lord Chief Justice nonsuited the plaintiff, giving leave to move to enter a verdict for 6629*l.*, or such other sum as the Court might think right.

Talfourd Serjt. now moved accordingly. First, the letter contains an acknowledgment. (The argument on this point is omitted). Secondly, this answer may be set up in support of the traverse. Under stat. 21 *Ja.* 1. *c.* 16. *s.* 3., it was at one time supposed that the effect of the limitation of actions was only to raise a presumption of payment, which might therefore be met by any proof of non-payment; and on this ground an acknowledgment was considered to be available as evidence, not of a new contract, but of the continuance of the original debt. That doctrine was overruled in *Tanner* v. *Smart* (*a*); and it is now clear law that, as well under stat. 9 *G.* 4. *c.* 14. *s.* 1. as under stat. 21 *Ja.* 1. *c.* 16. *s.* 3., an acknowledgment, to be available for this purpose, must amount to evidence of a new contract. But these statutes,

(*a*) 6 *B.* & *C.* 603.

and their interpretation, do not apply to actions upon specialties. At common law, a period of twenty years operated, not as a bar, but as evidence of payment; it might be shewn in support of a plea of payment; and such proof might be met by evidence shewing the improbability of payment; *Elliott* v. *Elliott* (*a*). Then does stat. 3 & 4 *W.* 4. *c.* 42. alter this? If not, why should the acknowledgment, which in that view is only an answer to the primâ facie presumption, be specially pleaded? [Lord *Denman* C. J. But, even if you are right so far, the difficulty arises on the form of your replication. *Erle* J. The plea follows the third section: your replication answers it only by denying that the action accrued so long ago as twenty years.] If the words "may, by way of replication, state," in sect. 5, be equivalent to "must," &c., the evidence was certainly inadmissible on this issue. [*Erle* J. There is this analogy against you. In the case of a simple contract, the new promise, to constitute an answer to the plea of the statute, must be consistent with the original one, as in cases where questions have arisen after the marriage of a female contractor. Then a parol promise can never support a count founded on a specialty. Hence arises a necessity for replying specially under sect 5.] That objection assumes that a parol promise cannot operate as negativing the presumption of nonpayment.

COLERIDGE J. (*b*). And that is so, when the time is pleaded in bar under sect. 3. The statute creates a bar

(*a*) 1 *Moo. & Rob.* 44.

(*b*) Lord *Denman* C. J. had left the Court during the latter part of the argument.

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to the remedy (*a*), which must be met, if at all, by a replication under sect 5.

WIGHTMAN and ERLE Js. concurred.

Rule refused.

(*a*) See *Sanders* v. *Coward*, 15 *M. & W.* 48. 57.

Tuesday, November 3d.

NEWTON and Another *against* BELCHER.
SAME *against* PALMER.
SAME *against* LIDDIARD.

Where separate actions were brought, by the same plaintiff, against several members of the provisional committee of a railway company, for work done for the company, a Judge's order to stay proceedings in all but one, made on the plaintiff's refusal to elect on which he would proceed, was rescinded by the Court.

In the same case, the action against one defendant having been tried, and a rule nisi granted for a new trial on a ground involving the amount to be ultimately recovered in it, the Court refused to stay proceedings in an action against another of the defendants until the first was determined.

KEANE moved for a rule calling on the defendants to shew cause why an order made by *Pollock* C. B., for staying proceedings in the two last mentioned actions, should not be amended, by making such stay of proceedings conditional on the defendants *Palmer* and *Liddiard* submitting to be bound and concluded, in the actions brought against them, by such verdict as should be found in the action against *Belcher*, and undertaking, if the verdict should be given in the action against *Belcher* in favour of the plaintiffs, to the satisfaction of the judge before whom the same should be tried, that no writ of error should be brought upon the judgment to be entered upon the said verdict, nor any bill in equity filed to be relieved from such verdict: or, why the said order should not be rescinded.

It was stated, in the affidavit on which the order was made, that all these actions were brought against members of a provisional committee for the recovery of the same sum of 4288*l.* 6*s.* 4*d.*, being the amount claimed by the plaintiffs as their demand against the *Oxford and Salisbury Railway Company* for services, in respect of which another action, *Newton and Another* v. *Harrison*, had also been brought. That these were actions in respect of a demand to which the several defendants were jointly liable, if at all; that the supposed contracts, on which the said actions were respectively brought, and which were the same identical contracts in each and all of the said actions, were one contract with which it was sought to charge the several defendants as respectively being, or supposed to be, members of the railway company in question; and that they were jointly liable, if at all, one with another, upon such supposed contracts, which were joint and not several contracts. On the application for the order being opposed, the Lord Chief Baron said that, as there was no denial of the identity of the causes of action, he should make the order, unless the plaintiffs would elect in which of the three actions they would proceed. This was refused on their part: and the order was made accordingly.

A rule nisi was granted (*a*); and, on a subsequent day of the term (*November* 16th),

M. Chambers and *Bramwell* shewed cause. *Giles* v. *Tooth* (*b*), recently decided in the Common Pleas, is in

(*a*) *Ross* v. *Jacques*, 8 *M. & W.* 135. and *Anderson* v. *Towgood*, 1 *Q. B.* 245., were referred to in moving.

(*b*) 3 *Com. B.* 665.

favour of the application to rescind: but the defendants here shew sufficient cause for adopting a different practice. For the Court of Common Pleas, in the case referred to, held that the jurisdiction to make such an order as the present was undisputed; but that it was only to be exercised where the proceedings of the plaintiff were vexatious; which, in their opinion, was not shewn in the instance before them. On the other hand, in *Carne* v. *Legh* (*a*) this Court stayed proceedings in a set of separate actions similar to the present, the defendant in one of them having paid the debt and costs: and also in *Everett* v. *Youells* (*b*), where a new action was brought for the same cause after the discharge of a jury by consent; and, in *Miles* v. *The Inhabitants of Bristol* (*c*), compelled a plaintiff, who had commenced a second action for the same cause in the Exchequer, to elect in which he would proceed. The case of actions on policies of insurance against underwriters is not in point: there, the liability is several, and actions against each are therefore distinct. [*Coleridge* J. In the present case, though the liability be joint, yet it must be made out by separate evidence against each. There is no ground for alleging that the proceeding is vexatious.] That is not strictly necessary. The ordinary case of requiring security for costs is a similar case of jurisdiction. But in point of fact, though the action be not vexatious, the result is so. *King* v. *Hoare* (*d*) establishes that, if one of several joint contractors is sued, and judgment obtained against him, another contractor being sued, may plead in bar the former judgment. Consequently two of these actions must be liable to be de-

(*a*) 6 *B.* & *C.* 124.
(*b*) 3 *B.* & *Ad.* 349.
(*c*) 3 *B.* & *Ad.* 945.
(*d*) 13 *M.* & *W.* 494.

feated by the success of the other: and the Chief Baorn's order was only with a view to obtain the same result more summarily, by staying the proceedings in two of them until the other is determined. There can be no substantial reason against interfering at this stage as well as a subsequent one: and the protection thus sought for is rendered necessary for co-contractors, by the difficulty which stat. 3 & 4 *W.* 4. *c.* 42. *s.* 8. imposes upon pleading in abatement, by enacting that no such plea for the non-joinder of any person as a co-defendant shall be allowed unless it be stated in such plea that the defendant is resident within the jurisdiction of the Court, and such statement be verified by the affidavit thereby required.

Keane, contrà, was stopped by the Court.

Lord DENMAN C. J. We do not think it necessary to hear the argument in answer, especially as the point has been decided by the Court of Common Pleas, and in perfect conformity with our opinion. Three parties are sued in separate actions. Each of the defendants urges that the claim, if any, is joint against all the three: and therefore he prays that proceedings may be stayed in two actions until the event of the remaining one. But, although this may be, in one sense, a case of joint liability, an action against parties liable only as provisional committeemen is not like one against parties jointly liable on a bond or covenant. The case, as against each, is to be made out by different evidence: the proof of the liability of each arises out of his own conduct or admissions. Therefore injustice might be done to a plaintiff, if he were not permitted to proceed at the same time in actions of which the cause may be the same but in which the evidence is different.

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COLERIDGE J. The plaintiffs are exercising an unquestionable legal right in suing these parties separately; and they, on the other hand, if their liability be joint, may plead in abatement. Nor is it denied that the Courts have jurisdiction to interfere in a more summary way, and would do so if the proceeding appeared to be vexatious. But it is admitted not to be so as regards the conduct of the present plaintiff; and I cannot see that it is so in its effects on the defendants. I should rather conclude that any such restriction as is here sought would be oppressive to plaintiffs. In cases like the present they have to make out the liabilities severally: and, by the delays which may be interposed in their suit against some of the members of a provisional committee, they run the risk of being altogether defeated in consequence of having selected one against whom the evidence fails.

WIGHTMAN J. The effect of this order would be, that each defendant would retain the benefit of his own separate defence, without giving the plaintiffs the benefit of their separate action.

ERLE J. concurred.

Rule absolute (*a*).

[*Wednesday, May* 26th, 1847.]

(*a*) NEWTON *against* LIDDIARD.

THE cause of *Newton* v. *Belcher* was afterwards tried at nisi prius, at the *Westminster* sittings after *Hilary* term 1847, before *Erle* J.: 1000*l.* was paid into Court, and the payment pleaded puis darrein continuance. A verdict passed for the plaintiff for 877*l.*, under the direction of the learned Judge. In the following term a rule nisi was obtained for a new trial, on the ground of misdirection. Pending this rule, the plaintiff gave notice f action in *Newton* v. *Liddiard.*

Sir *F. Thesiger* now moved for a rule to shew cause why the proceedings in this action should not be stayed until the determination of *Newton* v. *Belcher* (supra); and he referred to *Carne* v. *Legh* (6 *B.* & *C.* 124.), where, separate actions having been brought for a joint debt against several persons, and the defendant in one action having paid the debt and costs in that action, the Court stayed proceedings in the others. He referred also to *Rendel* v. *Malleson* (16 *M.* & *W.* 828.), where, in a similar case, the defendant in one action having paid into Court 300*l.*, *Alderson* B. permitted the defendant in another to enter on the record a plea of payment into Court to that amount without actually paying it in.

Lord DENMAN C. J. This is the same application, in other terms, with that which was made, and ultimately rejected by the Court, in *Newton* v. *Belcher*. Perhaps you may shape your rule in some other way.

PATTESON J. concurred.

COLERIDGE J. If the plaintiff is right in his claim, he has no security for recovering the amount of it. He may ultimately recover more than *Belcher* is able to pay. In *Rendel* v. *Malleson* (16 *M.* & *W.* 828.) no question about the amount seems to have been raised.

ERLE J. concurred.

Rule refused.

Both the above cases are reported by *H. Merivale*, Esq.

See *Henry* v. *Nash*, 1 *Exch. R.* 826.

BARNETT *against* COX and Another.

Tuesday, November 3d.

TRESPASS for an assault and false imprisonment. Plea, Not Guilty, by statute.

On the trial, before Lord *Denman* C. J., at the

The time limited for bringing actions against justices of a Metropolitan police district in respect of a conviction under stat. 2 & 3 *Vict. c.* 47. *s.* 18., made in exercise of the jurisdiction given them by stat. 3 & 4 *Vict. c.* 84. *s.* 6., is three calendar months, the period prescribed by stat. 2 & 3 *Vict. c.* 71. *s.* 53., and not six calendar months, the period given by stat. 10 *G.* 4. *c.* 44. *s.* 41.

The Metropolitan Police Acts above mentioned are not local and personal within the meaning of stat. 5 & 6 *Vict. c.* 97. *s.* 5.; and therefore the times limited by the statutes respectively for the bringing of actions are not altered by that clause.

Middlesex sittings after last *Trinity* term, it appeared that the defendants were magistrates of the county of *Middlesex*, appointed to act for the *Uxbridge* Police Court division, under stat. 3 & 4 *Vict. c.* 84. (*a*), which recites stats. 2 & 3 *Vict. c.* 47. (*b*) and 2 & 3 *Vict. c.* 71. (*c*), and enacts (by sect. 2) "that it shall be lawful for her Majesty" "from time to time to constitute within the Metropolitan Police district so many police court divisions as to Her Majesty shall seem fit," to define their extent, to alter their number and extent from time to time, and "to assign a division to each of the police courts already established, and to establish a police court for each of the other divisions:" and that the plaintiff had been summarily convicted by the defendants, under sect. 18 of stat. 2 & 3 *Vict. c.* 47., of having incited one *Cook* to resist a police officer in the execution of his duty. The conviction imposed a penalty, and (under sect. 77 of this statute) commitment for fourteen days in default of payment; and the plaintiff, not paying, was committed; which was the imprisonment now complained of. The fact was shewn to have occurred within six but not within three calendar months before the action was brought: and on this ground the Lord Chief Justice directed a nonsuit, it being enacted, by sect. 53 of stat. 2 & 3 *Vict. c.* 71., "That no action, suit, or information, or any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done or omitted to be done in pursuance of this act, or in the execution of

(*a*) "For better defining the powers of justices within the Metropolitan Police district." See stat. 10 *G.* 4. *c.* 44.

(*b*) "For further improving the police in and near the Metropolis." See sect. 2.

(*c*) "For regulating the Police Courts in the Metropolis."

the powers or authorities under this act, unless twenty days' previous notice" &c. shall be given &c., "nor unless such action", &c. "shall be brought or commenced within three calendar months next after the act committed:" and, by sect. 6 of stat. 3 & 4 *Vict. c.* 84., "That any two justices of the peace having jurisdiction within the Metropolitan Police District shall have, while sitting together publicly in the Court" &c. "used" &c. "in any part of the said district within the limits of their commission, except in the divisions to be assigned to the police courts already established," "all the powers, privileges, and duties which any one magistrate of the said police courts has while sitting in one of the said courts by the two recited acts" "or either of them."

Bramwell now moved for a new trial. The action was in time. By the Metropolitan Police act 10 *G.* 4. *c.* 44. *s.* 41., "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise." Stat. 2 & 3 *Vict. c.* 47. *s.* 79. incorporates that act with stat. 10 *G.* 4. *c.* 44., and enacts "that all the provisions of the said act, except so far as is herein otherwise provided, shall extend to this act, and to all things done in execution of this act." By stat. 2 & 3 *Vict. c.* 71. *s.* 53. (the clause relied on for the defendants), no action &c. is to be brought, commenced, or prosecuted "for anything done or omitted to be done in pursuance of this act, or in the execution of the powers and authorities under this act," unless

brought &c. within three calendar months next after the fact committed; and, by sect. 55, this act, and the two before mentioned, are to "be construed together as one act." Nothing in the two former statutes is expressly repealed: there is an implied repeal of provisions which might affect transactions expressly regulated by the present act, and are inconsistent with it (*a*), but nothing further. In *Hazeldine* v. *Grove* (*b*), which may appear to be an authority for the defendants, the Court (as *Maule* J. stated the case in *Eliot* v. *Allen* (*c*)) decided only that a police magistrate acting under stat. 2 & 3 *Vict. c.* 71. was within the provisions of sect. 53, though exercising only the common functions of a justice of peace, and not such as were peculiar to a police magistrate: and the reason given by Lord *Denman* C. J. was that, where, by appointment under a statute, the same person acquired the powers of a police justice and of an ordinary magistrate, it was inconvenient to attempt a distinction between the two authorities for the purpose of excluding or admitting a statutory protection. Here the defendants were exercising an authority, under stat. 2 & 3 *Vict. c.* 47., sects. 18 and 77, which they would not have had under stat. 2 & 3 *Vict. c.* 71.; therefore the peculiar limiting clause of that act does not apply, and reference must be had to the unrepealed protecting clause, stat. 10 *G.* 4. *c.* 44. *s.* 41., which, by the operation of stat. 3 & 4 *Vict. c.* 84. *s.* 6., extends to the magistrates whose powers are defined by that act.

But, further, it is a question whether the three months'

(*a*) See the argument for the plaintiff in *Hazeldine* v. *Grove*, 3 *Q. B.* 997. 1003.

(*b*) 3 *Q. B.* 997.

(*c*) 1 *Com. B.* 18. 37.

limitation be not abolished by stat. 5 & 6 *Vict. c.* 97. *s.*5., which, after reciting that "divers acts commonly called public local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said acts respectively," enacts that the period within which any action may be brought "for anything done under the authority or in pursuance of any such act or acts shall be two years," and repeals every enactment by which any other period of limitation is appointed. The Police acts now in question are framed for the exigencies of a particular district, containing, it is true, two or three millions of people; but, if that consideration had weight, it would be difficult to say where the line between general and local acts should be drawn. The jurisdiction under stat. 3 & 4 *Vict. c.* 84. *s.* 6. may be a very circumscribed one. By stat. 10 *G.* 4. *c.* 44. *s.* 44. it is expressly declared "that this act shall be deemed and taken to be a public act;" which shews that the legislature did not regard such acts as public independently of positive enactment. The Building act of 14 *G.* 3. *c.* 78. (at least in part), and the *Sandwich* Court of Requests act, 1 stat. 47 *G.* 3. *c.* xxxv. (local and personal, public), have been held to come within the description "acts of a local and personal nature" in sects. 3 and 5 of stat. 5 & 6 *Vict. c.* 97.; *Richards* v. *Easto* (*a*), *Cock* v. *Gent* (*b*).

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term (*November* 16th), delivered the judgment of the Court.

(*a*) 15 *M. & W.* 244. (*b*) 12 *M. & W.* 234.

This was an action against two magistrates of the county of *Middlesex* for a committal upon a conviction under stat. 2 & 3 *Vict. c.* 47. *s.* 18. The plaintiff was nonsuited at the trial because the action was not commenced within three months after the cause of action arose: and he has moved for a rule nisi for a new trial on the ground that the nonsuit was wrong. It is decided that, if the plaintiff had been committed by a police magistrate appointed under stat. 2 & 3 *Vict. c.* 71., his right of action would be barred at the end of three months; *Hazeldine* v. *Grove* (*a*). The defendants were not so appointed, but were two magistrates acting under stat. 3 & 4 *Vict. c.* 84. *s.* 6., by which it is enacted that two magistrates of the county acting in certain parts of the Metropolitan police district, for which no police magistrate has been appointed, shall have all the powers, privileges and duties of police magistrates acting under stat. 2 & 3 *Vict. c.* 47. and *c.* 71. The defendants, therefore, having all the privileges of a police magistrate by virtue of the last mentioned statute, have the privilege of the limitation of three months to bar actions against them which a police magistrate would have had.

It is contended, secondly, that the statutes above mentioned relating to the metropolitan police are either "commonly called public local and personal," or are "of a local and personal nature", within stat. 5 & 6 *Vict. c.* 97., and so repealed as to the limitation of three months. But we are of opinion that the statutes in question are not within stat. 5 & 6 *Vict. c.* 97. They are classed with the public and general acts, and not

(*a*) 3 Q. *B.* 997.

with the public, local and personal, according to the division directed by the houses of parliament, as mentioned in *Richards* v. *Easto* (*a*): and they are not in our judgment of a local and personal nature within the meaning of stat. 5 & 6 *Vict. c.* 97., considering the public importance of the rights that they maintain, and the generality of their application to all the Queen's subjects within the Metropolitan police district.

Therefore there will be no rule.

Rule refused.

(*a*) 15 *M. & W.* 251.

EWER *against* JONES.

Saturday, November 7.

TRESPASS quare clausum fregit. Plea (fourth): that the locus in quo was the soil and freehold of *Louisa Pennant;* and justification by defendant as her servant, and by her command &c. Replication, traversing the command. Issue thereon.

There were also other issues of fact.

On the trial, before Lord *Denman* C. J., at the last *Flintshire* assizes, it appeared that the locus in quo was a yard appurtenant to a house held by plaintiff under an unexpired lease granted by a former reversioner; and that the present owner of the reversion was *Louisa Pennant*, a minor, and ward in Chancery. The defendant was the receiver, and the general agent of

To a declaration in trespass quare clausum fregit, defendant pleaded that the locus in quo was the soil and freehold of *T.*; and justified as servant, and by command, of *T.* Replication, traversing the command.

T. was a minor and ward in Chancery, and defendant the receiver and general agent for the estate.

Held, that from this the jury might infer a general authority to do the act, and, if they so inferred, ought to find for the defendant. And that, upon this issue, the plaintiff was not entitled to shew that he held under a lease, and to insist that the act was therefore such as an infant could not authorize.

Louisa Pennant. The Lord Chief Justice left to the jury to say whether they were satisfied that the act was authorized by *Louisa Pennant*; adding that, if they thought the act fairly within the scope of the defendant's authority as general agent, the justification was made out. The jury answered, that they found the defendant to be an accredited agent and to have had a general authority extending to such an act. Verdict for defendant on this issue.

Townsend now moved for a new trial on the ground of misdirection (*a*). In *Chambers* v. *Donaldson* (*b*) it was decided that the command may be traversed, which had been denied. But there ought to be evidence of express command by a party capable of giving the authority; *Dobree* v. *Napier* (*c*). Now a ward in Chancery can exercise no such power: it must be exercised by the guardian. [Lord *Denman* C. J. The guardian's authority would support the plea.] From *Lord Kilmurry* v. *Dr. Grey* (*d*) it would seem that a minor has no power to give such an authority. He cannot be made a disseisor either by prior command or subsequent assent: "Neither an infant, nor feme covert, can be guilty of a forcible entry or disseisin, by barely commanding one, or by assenting to one to their use, because every such command or assent by persons under these incapacities is void;" 4 *Bac. Abr.* 353 (7th ed.) tit. *Infancy and Age* (H). The books there cited

(*a*) He also moved on the ground that the verdict was, in other respects, against evidence: the argument on this ground is omitted.

(*b*) 11 *East*, 65.

(*c*) 2 *New Ca.* 781. 798.

(*d*) Cited in *Evelyn* v. *Evelyn*, 2 *P. Wms.* 671.; S. C., but not on this point, 2 *Salk.* 538. See 3 *Atk.* 713. and 1 *Ves. Sen.* 305 (in *Hearle* v. *Greenbank*); *Chambers on Infants*, p. 409.

shew that the authority here was not merely voidable. [*Wightman* J. Was this against the interest of the infant?] The plaintiff so contended: but, even if such an act were for the infant's benefit, she could not command it. [*Erle* J. Cannot an infant authorize an agent to turn out a wrong doer? Lord *Denman* C. J. Must not that be a natural consequence of a general authority?] The plea of liberum tenementum admits a possession in the plaintiff. [*Erle* J. The authorities do not clearly shew that. I take it to be an assertion of such a right as would authorize the defendant's act: I do not know how else to make it intelligible.] It certainly does assert the right of possession to be in the defendant; but not the actual possession. That being so, the act here done is a disseisin. [*Wightman* J. The seisin is in *Louisa Tennant*, according to the plea.] Not the immediate possession; *Doe* v. *Wright* (*a*).

Lord DENMAN C. J. If there was no right to do the act, the pleadings are here unfortunately framed. Nothing is in question but the command.

COLERIDGE J. The fact that the freehold is in *Louisa Tennant* is admitted by the replication: so far, therefore, it is unimportant that she is a minor and a ward in Chancery. We cannot, then, take her situation to be inconsistent with the authority: nothing appears to shew that the act was such as she could not command on her own land.

(*a*) 10 *A. & E.* 763. 781.

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EWER v. JONES.

WIGHTMAN J. To shew that, the lease should have been replied.

ERLE J. concurred.

Rule refused.

Wednesday, November 11th.

The QUEEN *against* The Inhabitants of WATFORD.

Under a statement, as ground of objection to an order of removal, that the pauper does not appear by the examinations to have been "actually chargeable to your said parish" when the order was made, the appellants cannot object that the pauper does not appear by the examinations to have been resident in the removing parish at the time.

Birth confers a settlement without a residence of forty days.

Where an order of removal described the pauper as a widow, and the examination mentioned the name of her deceased husband, but did not shew whether he had any settlement, nor that any inquiry had been made on the subject: Held, that she might be removed to the place of her birth settlement.

An order of removal stated that it was made on the complaint of the overseers of the removing parish, not mentioning the churchwardens. Held sufficient.

ON appeal against an order of two justices, removing *Maria Lewis*, widow, from the parish of *St. John* at *Hackney*, in *Middlesex*, to the parish of *Watford*, in *Hertfordshire*, the sessions confirmed the order, subject to a case, which was stated substantially as follows.

The order of removal was in these terms. "*Middlesex*, to wit. } To the overseers of the poor of the parish of *St. John*" &c. "Whereas complaint hath been made to us whose names" &c., "being two" &c., "by the overseers of the poor of the parish of *St. John* at *Hackney*, that *Maria Lewis*, widow, has come to inhabit in the said parish of *St. John* at *Hackney*, not having gained any legal settlement there, and now has actually become chargeable thereto" &c.: The order then directed her removal to *Watford*.

The examinations were as follows. "*Middlesex*" &c. "The several examinations of *Maria Lewis*," of &c., "the widow of *James Lewis*, deceased; and of" &c. (other deponents). "The said *Maria Lewis* on her

oath saith that she does not know the place of legal settlement of her said late husband, *James Lewis*, deceased. That she, this deponent, never was bound an apprentice, or hired yearly servant, or done any act to gain a settlement in her own right. That she is now actually become chargeable to, and been relieved by, the parish of *St. John* at *Hackney*, in the county of *Middlesex*, for several weeks last past, with money and bread, and with one shilling on the day of the date of this her examination." The examination of *William Butler*, of &c., stated that *Maria Lewis* was born in the parish of *Watford*, sixty four years back. *Joseph Dossett*, relieving officer of the *Hackney* Union in *Middlesex*, deposed: "That the said *Maria Lewis* is chargeable to, and has been relieved by, the parish of *St. John* at *Hackney*, in the county of *Middlesex*, with bread and money for several weeks last past, and with one shilling on this 11th day of *December* 1844."

The first ground of appeal was: "That the examinations on which the said order of removal was made are bad, defective and insufficient on the face thereof respectively, and fail and omit to shew, by sufficient statements of facts and by proper and legal evidence of such facts, that the said *Maria Lewis* was, at the time that the said order was made, actually chargeable to your said parish of *St. John* at *Hackney*."

The second objection was: "That the said examinations are also wholly insufficient to warrant and support the said order, inasmuch as they fail and omit to shew that the said *Maria Lewis* ever inhabited in our said parish of *Watford* for the space of forty days at the least, so as to gain a legal settlement there."

The third objection, likewise to the sufficiency of the

examinations to support the order, was, that they contained no evidence tending to shew that *James Lewis* was, or ever had been, settled in *Watford*.

The fourth objection, likewise to the sufficiency of examinations, was, that they failed to shew that the place of *James Lewis*'s last legal settlement was unknown and could not be ascertained.

When the appeal came on to be heard, the appellants relied on all these objections: but the sessions overruled them, held the examinations sufficient, and confirmed the order of removal, subject to the decision of this Court.

The appellants also insisted that the order of removal was bad for not shewing on its face that it was made on a sufficient complaint by parish officers having authority to complain in such behalf. The sessions overruled this objection also, subject to the opinion of the Court of Queen's Bench.

If this Court should be of opinion that any of the objections ought to have been allowed, the order of removal and order of sessions were to be quashed; otherwise to stand affirmed.

Prendergast in support of the order of sessions. First, chargeability, down to the time of complaint, appears beyond doubt from the statements of the pauper and the relieving officer. [*Pashley*. The objection is that the pauper is not shewn to have been resident in St. *John*, *Hackney*, when relieved.] Her examination shews it. And this point is not stated in the grounds of appeal; nor was it reserved by the sessions. Examinations must be construed according to a "fair and reasonable intendment;" *Regina* v. *Rotherham* (*a*). As

(*a*) 3 Q. B. 776. 784. 788.

to the husband's settlement, *Maria Lewis*'s examination warranted the assumption that it was unknown, according to the doctrine laid down by this Court in *Regina* v. *Birmingham* (*a*). The observations in 1 *Nol. P. L.* 293 (4th ed.) likewise agree with this view.

The objection to the birth settlement depends on a construction of stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., never yet recognized. That clause gives power to remove a pauper or paupers "to such parish where he or they were last legally settled, either as a native, householder, sojourner, apprentice or servant, for the space of forty days at the least, unless he or they give sufficient security" &c.: and it must be contended on the other side that the words "for the space of forty days at the least" apply to the word "native" as well to those more immediately preceding, so that the party must not only be a native, but have been so for forty days. But settlement by birth has always been held to depend upon the fact of birth only. By stats. 12 *Ric.* 2. *c.* 7. and 1 *Ja.* 1. *c.* 7. (observed upon in 1 *Nol. P. L.* 268, 270), beggars were to be sent to the places in which they were born. Then came stat. 13 & 14 *Car.* 2. *c.* 12., which, according to the natural construction of sect. 1, makes the same provision as to the removal of paupers. The Resolutions of the Judges in 1633 (*b*) state the law nearly as the statute gives it: "Every one who is settled as a native, an householder, sojourner, an apprentice, or a servant retained for one month, at the least, without a just complaint" &c. shall be held to be settled. [*Coleridge* J. That differs from the

(*a*) 8 *Q. B.* 410.

(*b*) *Dalt. Just.* 289. Cited 1 *Nol. P. L.* 273, and ibid. note (3), as from *Dalt. Just.* 236 and 289. The edition is not mentioned. In *Dalt. Just.* ed. 1742 the passage occurs, p. 174, without the word "retained," the words after "servant" being "for a month at the least."

statute by the introduction of the word "retained." According to your construction, the resolution makes the term of a month necessary in the case of a servant only.] "Retained for one month" cannot be connected with "native." Mr. *Nolan* (Vol. I. p. 288), notwithstanding the doubt, which he notices (note (1)), whether forty days' residence be not necessary to a birth settlement, lays down expressly that "the place where the individual is born is, as it were, pointed out by nature, and acknowledged by every statute which regulates the subject, as one in which he is accounted settled by the mere circumstance of birth." And, in 4 *Burn's Just.* 409, 29th (*Chitty* and *Bere's*) ed., it is said that "Legitimate children take the settlement of their father; if the father has no settlement, they are entitled to the settlement of their mother; and it is only when both these sources fail, that their right accrues to a settlement in the place in which they were born. But until the settlement of the father or of the mother has been ascertained, the settlement of a legitimate child, like that of a bastard, is primâ facie in the parish where the birth took place:" and *Spittlefields and St. Andrew's Holborn* (*a*), *Rex v. St. Mary, Leicester* (*b*), and *Cripplegate* v. *St. Saviour's* (*c*), are cited. It is true that, at p. 411, it is said that "it would seem that a residence of forty days is essential to the acquisition of a birth settlement;" but it is added that "there is no decision to this effect, and the tacit convention of parishes not to insist upon it would most probably induce the Court of King's Bench to overrule such an objection, if it were now attempted to be set up."

The Court then called upon

(*a*) *Fort.* 307. (*b*) 3 *A. & E.* 644.
(*c*) 2 *Bott, P. L.* 12. pl. 27. 6th ed.

Pashley, contrà. First: before stat. 13 & 14 *C.* 2. *c.* 12., there was no power of removing a pauper, merely as such: and sect. 1 of that statute gives no authority to remove except to a place in which a person has been settled "for the space of forty days at the least." [*Coleridge* J. If you contend that "for the space of forty days" applies to all the preceding words, try that by striking out the words after "native." Then what meaning can you give to the words "native for the space of forty days?"] The word "settled" is the word connected with the words "for the space of forty days." It is argued that general convention has superseded this enactment; but the passage cited from 4 *Burn's J.*, 411, shews that this is not undisputed: and, even if it were so, this could not repeal an express enactment; *Rex* v. *Eriswell* (*a*): and the power of removal is merely the creation of the legislature; *Rex* v. *Saighton-on-the-Hill* (*b*). Stat. 12 *R.* 2. *c.* 7. was directed against vagrants who, if they could not work, and the towns where they were found could not maintain them, were to be removed to their place of birth. By stat. 11 *H.* 7. *c.* 2. it was enacted that every beggar not able to work should resort to the hundred where he last dwelled, was best known, or was born. Stat. 43 *Eliz. c.* 2. first established a compulsory power to raise a fund for the relief of the poor generally. It is clear that these enactments must, so far as regards the pauper, be construed strictly, as they are penal in their nature and origin. This was manifestly so understood in 11 *James* 1.; when *Flemming* C. J., in a case of *Weston and Cowledge* (*c*), mentioned in *Dalton*, said that young children, whose parents were dead, were

(*a*) 3 *T. R.* 707. 725.
(*b*) 2 *B. & Ald.* 162. 164.
(*c*) *Dalt. Just.* 168. ed. 1742.

not to be removed to their place of birth, unless they should wander abroad and beg, because, if the parents were not rogues, the children were not to be made so. It is added, in *Dalton* (p. 169), that some had holden that a justice might remove and settle the poor generally, subject to appeal to Quarter Sessions; but that Sir *Francis Harvey*, A. D. 1629, had laid down that justices, especially out of sessions, were not to meddle with the settling or removing of any poor but only of rogues. And *Lambard* (*Duties of Constables*, 51, ed. 1619) states that by the Resolutions of the Judges only rogues could be removed. After stat. 43 *Eliz. c.* 2., in 5 *C.* 1, the Judges of assize resolved (*a*) "that the place of birth, or the place of their last habitation (if the same may be known) are in judgment of law said to be the places of settling." It appears therefore that, before stat. 13 & 14 *C.* 2. *c.* 12., permanency of residence was looked to. [*Erle* C. J. Then what did the legislature mean by giving a settlement to a person settled as a native for forty days? The mere settlement for forty days would have been enough without the statute.] Till the statute, there was no settlement in the modern sense of the word. That is what the statute gave, if it gave any thing, which is not clear. [*Coleridge* J. Then what was the condition of a bastard?] He could not be removed from the place where he was born. That the question now before the Court has not previously arisen is attributable to the fact that a person ordinarily resided forty days in his place of birth. But, now that written documents have become necessary for shewing a settlement, the question must arise, wherever such residence is not expressly shewn. Even in the

(*a*) 2 *Bulst.* 352.

present case, where the question has so arisen, it is probable that in fact there was a residence. If there be any ambiguity in the language of the statute, the construction will be adopted which most favours the liberty of the subject, that is, the construction least favourable to the power of removal.

Next, as to the chargeability. The objection is sufficiently raised by the grounds of appeal. *Regina* v. *Flockton* (*a*) shews how generally objections may be framed. *Regina* v. *Bradford* (*b*) is an authority for requiring a strict statement of the chargeability to the particular parish. [*Coleridge* J. That case seems to have turned merely on the question how far the officer giving the relief was entitled to place it to the account of a particular parish.] It cannot be inferred, from the fact of relief, that the pauper was resident in the parish at the time. *Regina* v. *Rotherham* (*c*) has been cited; but there the point arose upon certiorari, no case being stated. At any rate, the doctrine that examinations are to be construed by reasonable intendment must now be considered as overruled. Parties whose case depends on a particular combination of facts must shew by evidence how those facts stood, and not require it to be assumed; *Castrique* v. *Bernabo* (*d*).

Next, the husband's settlement should have been ascertained, or the fact that he had no settlement should have been established. In *Regina* v. *Birmingham* (*e*) it does not appear to have been pressed on the Court that the pauper was described as a widow, so that the order would be evidence of the settlement of her husband;

(*a*) 2 *Q. B.* 535.

(*b*) 8 *Q. B.* 571.; note (*h*) to *Regina* v. *Hartpury*. See *Regina* v. *Little Marlow*, 10 *Q. B.* 223.

(*c*) 3 *Q. B.* 776.

(*d*) 6 *Q. B.* 498.

(*e*) 8 *Q. B.* 410.

Rex v. *Rudgeley* (*a*). That is so here. The examinations, therefore, do not support the removal of the pauper as widow.

Lastly, the order shews no jurisdiction; an objection which need not be specified in the grounds of appeal. The overseers alone appear to make the complaint; not the overseers and churchwardens, nor the majority of the whole body, nor a part authorized by the rest. The objection was held fatal in *Rex* v. *Fairfax* (*b*). That a majority of the whole body must concur, is shewn by *Regina* v. *The Justices of Cambridgeshire* (*c*). In *Ex parte The Overseers of Harnley* (*d*) it was held that a guardian of a township must, in signing a document to take effect by virtue of that office (under stat. 22 *G.* 3. *c.* 83.), describe himself as guardian, and that it is not enough to describe himself as overseer. [*Erle* J. referred to *Regina* v. *Bedingham* (*e*).] The objection there overruled was, that a written complaint was signed by one party only, though all concurred: here the objection is, that no concurrence is shewn. [*Erle* J. The overseers are the churchwardens and other substantial inhabitants, by stat. 43 *Eliz.* *c.* 2. *s.* 1.] That answer, if valid, would have prevailed in *Rex* v. *Fairfax* (*b*).

Lord Denman C. J. It appears to me that none of the objections, as taken in the grounds, can prevail. The first is, that it does not appear that the pauper was actually chargeable to the removing parish at the time of the making of the order. I think I can, in common sense, read this only as an objection that the

(*a*) 8 *T. R.* 620.
(*b*) 3 *Mod.* 269 271.
(*c*) 7 *A. & E.* 480.
(*d*) 1 *D. & L.* 673.
(*e*) 5 *Q. B.* 653.

fact of chargeability does not appear. If the appellants had said that the residence of the pauper at the time of the relief ought to have been stated, that would have raised the point now made. The second objection is, that the examinations are insufficient, as failing to shew that the pauper inhabited in the appellant parish for forty days. That raises the question as to the meaning of the provision in sect. 1 of stat. 13 & 14 *C.* 2. *c.* 12., giving power of removal to the place where a pauper was "last legally settled, either as a native, householder, sojourner, apprentice or servant, for the space of forty days at the least." The act seems to me both to recite and infer that there may be a legal settlement by the mere fact of being a native. It is important to keep in view the state of the law, with which we must assume that the legislature was acquainted, when that statute passed. Now birth of itself clearly then conferred a settlement. Every one who has attended quarter sessions must know that birth alone has been always held sufficient to confer a settlement. The traditional view, referred to in 4 *Burn's Justice*, 411, even if the language of the statute did not go so far, must have existed for a long time. The third objection is, that there is no evidence shewing that *James Lewis*, whose widow the pauper is, was settled in the appellant parish; and the fourth objection is, that it does not appear that his settlement cannot be ascertained. The validity of these objections depends upon the question whether *Regina* v. *Birmingham* (*a*) was rightly decided. Mr. *Pashley* does not object to the doctrine that, the settlement of a female in her own right being shewn, it is in general no answer that she had a husband of whose settlement nothing is known: but he raises a very in-

(*a*) 8 *Q. B.* 410.

genious argument from the fact that the order itself, in this case, describes the pauper as a widow; whence he argues that the removal would of itself become evidence of the settlement of the husband, although in fact established by proof relating only to herself. I might, perhaps, answer that it may reasonably amount to a decision of the husband's settlement, inasmuch as both appellants and respondents would have an interest in ascertaining that. But, however this may be, I think Mr. *Pashley*'s inference cannot be legitimately drawn. For it is settled law that the wife's birth settlement may be shewn and relied upon in the first instance, without inquiring where the husband is: then the decision on her settlement ceases to be evidence of his. Lastly, as to the objection that the order states only that the complaint is made by the overseers of the removing parish, without mentioning the churchwardens: we need not enquire whether the word "overseers" includes in itself "churchwardens," because stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1. gives the power of removal on the complaint of the "churchwardens *or* overseers." Before I conclude, I must repeat that it is very important it should be fully understood that parties go to issue strictly on the points named in the grounds of appeal. For, where those grounds raise a valid objection, the removing parish may withdraw from the contest. Parties therefore should be confined to trying that which both have agreed to try.

Coleridge J. concurred.

Wightman J. I agree on all points. My only doubt has been removed by the use of the word "or" in stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1.

ERLE J. I concur. If it had been requisite, I should have wished to enquire whether the word "overseers" does not include "churchwardens."

Lord DENMAN C. J. That undoubtedly is so.

Orders affirmed.

The QUEEN *against* The Commissioners of Stamps and Taxes.

Saturday, November 14th.

MANDAMUS. The writ recited that *Thomas* Lord *Wallace* departed this life, 23d *February* 1844, having duly made his last will and testament, and appointed Sir *Charles Miles Lambert Monck*, Baronet, and three others named in the writ, executors. That probate of the will was granted by the Prerogative Court of *Canterbury*, on the 19th *July* 1844; and the personal estate and effects of which such probate was granted were sworn to be under 45,000*l.*; and a stamp duty (*a*) afterwards paid debts indiscriminately out of the whole personalty: Held, that they were not entitled, for the purpose of demanding a return of duty under stat. 5 & 6 *Vict. c.* 79. *s.* 23., to add together the amounts in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, and then estimate the duty payable on the remainder, and demand back the difference between such duty and the aggregate of the sums paid on the two probates.

Where a testator left personal property in each of the provinces of *Canterbury* and *York*, and probates were taken out for the property being in each province respectively, and separate duties paid on each probate, and the executors

Semble, that an equitable mode of calculating the sum to be returned was to apportion the sum paid for debts in the ratio of the estates in each province, and deduct the respective portions of the debts from the values of the respective estates.

(*a*) Stat. *55 G.* 3. *c.* 184. Schedule, Part III.

"Probate of a will," "to be granted in *England*;" "where the estate and effects for or in respect of which such probate" "shall be granted," "exclusive of what the deceased shall have been possessed of or entitled

of 600*l.* was accordingly paid by the executors thereon. That probate of the said will was also granted by the Prerogative Court of *York*, on 5th *September* 1844; and the personal estate and effects for and in respect of which the last mentioned probate was granted were then sworn to be under 8000*l.*; and a stamp duty of 140*l.* was accordingly paid by the executors on that probate. That, the personal estate and effects, for which probate was granted by the Prerogative Court of *Canterbury*, having been fully got in, and the amount thereof clearly ascertained, it has been found that the same did not, at the time of the death of Lord *Wallace*, or at the time of granting the last mentioned probate, exceed 43,377*l.* 3*s.* 6*d.*: and that, the personal estate and effects for which probate was granted by the Prerogative Court of *York* having been also fully got in, and the amount thereof clearly ascertained, it has been found that the same did not, at the time of the death &c., or at the time of granting the last mentioned probate, exceed 7569*l.* 18*s.* 2*d.* That the executors have paid debts due and owing from Lord *Wallace*, and payable by law out of his personal estate, to the full amount of 2689*l.* 6*s.* 10*d.*; which, being deducted from the amount or value of the said estate and effects of the deceased, would have occasioned a less stamp duty to be paid on the said probates of the will than was

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to as a trustee for any other person or persons, and not beneficially, shall be"

	£	*s.*	*d.*
"Of the value of 4000*l.* and under the value of 5000*l.*	80	0	0"
—— "7000*l.* and under" —— "8000*l.*	140	0	0"
—— "40,000*l.* and under" —— "45,000*l.*	600	0	0
—— "45,000*l.* and under" —— "50,000*l.*	675	0	0
—— "50,000*l.* and under" —— "60,000*l.*	750	0	0"

actually paid thereon, by the sum of 65*l.* That, within three years after the dates of the said probates, or the date of either of them, application was made to the Commissioners of Stamps and Taxes, by the executors, to return the difference, pursuant to the statute in such case &c.: and that it was proved by oath, and proper vouchers, to the satisfaction of the Commissioners, that the executors had paid the said debts due and owing from Lord *Wallace*, and payable by law out of his personal and moveable estate, to the amount aforesaid. That the Commissioners had neglected and refused to return the difference. The writ then commanded the Commissioners that, immediately &c., they should return to the executors, or their attorney, the said sum of 65*l.*, being part of the duty paid for and in respect of the probates granted of such last will &c.; or signify cause &c.

Return. That the said sum of 2689*l.* 6*s.* 10*d.*, so due and payable in respect of the debts of Lord *Wallace*, as in the writ mentioned, was payable from the time of the decease of Lord *Wallace* out of his general personal estate and effects; that is to say, as well out of the said personal estate and effects of Lord *Wallace* situate, at the time of his decease, in the said province of *Canterbury*, as out of the said personal estate and effects of Lord *Wallace* situate, at the time of his decease, in the said province of *York*. And that the said personal estate and effects so situate in the said province of *Canterbury* amounted to the said sum of 43,377*l.* 3*s.* 6*d.*, as in the writ mentioned; and the said personal estate and effects so situate in the said province of *York* amounted to the said sum of 7569*l.* 18*s.* 2*d.*, as in the writ mentioned. And that, for the purpose of ascertaining

whether any and what portion or portions of such stamp duties so paid as in the writ mentioned ought to be returned to the executors, according to the statute in that case &c., a proportionate part only of the said amount of debts ought to be deducted from the respective gross amounts of the said estate and effects in respect of which each of the said duties was paid in respect of each of the said probates: that is to say, such a proportion of the amount of the said debts as the gross amount of the estate and effects in each of the said respective provinces bears respectively to the gross amount of the whole estate and effects in both of the said provinces. That the said proportion of the amount of the said debts which ought to be so deducted from the amount of the estate &c. in the said province of *Canterbury* amounts to 2289*l.* 15*s.*, and no more: and that such amount, being deducted from the said gross amount of the estate &c. within the said province, in respect of which the said probate was granted by the Prerogative Court of *Canterbury* as in the writ mentioned, that is to say the said sum of 43,377*l.* 3*s.* 6*d.*, did not, nor does, reduce the same to a sum which, if it had been the whole gross amount or value of such estate &c. in the province of *Canterbury*, would have occasioned a less stamp duty to be paid on such probate than the amount which has been so paid thereon as in the writ mentioned, but reduces the same only to the sum of 41,087*l.* 8*s.* 6*d.* And that the said proportion of the amount of the said debts which ought to be so deducted from the amount of the estate &c. in the province of *York* amounts to 399*l.* 11*s.* 10*d.*, and no more: Averment, as in the case of the previous deduction, that the last mentioned amount, being de-

ducted from the gross amount in respect of which probate was granted by the Prerogative Court of *York*, does not reduce the same to a sum for which, if it had been the whole value of the estate &c. in the province of *York*, a less probate duty would have been payable than has been paid, but reduces the same only to 7170*l.* 6*s.* 4*d.* Wherefore the Commissioners have not returned, and ought not to return &c.

General demurrer. Joinder.

Watson, for the Crown. This return of duty is claimed under sect. 23 of stat. 5 & 6 *Vict. c.* 79., which enacts "that where it shall be proved by oath and proper vouchers to the satisfaction of the said Commissioners of Stamps and Taxes, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as, being deducted from the amount or value of the estate and effects of the deceased for or in respect of which a probate or letters of administration shall have been granted in *England* after the 31st day of *August* 1815," "shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate or effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration" "than shall have been actually paid thereon, it shall be lawful for the said Commissioners of Stamps and Taxes and they are hereby required to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration." Here the whole sum in respect of which the probates have been granted is the aggre-

gate of the 43,377*l.* 3*s.* 6*d.* for which probate was granted in *Canterbury*, and the 7569*l.* 18*s.* 2*d.* for which probate was granted in *York*: that is, 50,947*l.* 1*s.* 8*d.* Deducting from this the debts, amounting to 2689*l.* 6*s.* 10*d.*, the amount remaining is 48,257*l.* 14*s.* 10*d.*, on which the duty would be only 675*l.*, whereas 740*l.* has been paid: the sum to be returned is therefore 65*l.* It is true that sect. 23 uses the word "probate" only, and not "probates:" but, by the interpretation clause, sect. 25, "wherever in this act, with reference to any person, matter, or thing, any word or words is or are used importing the singular number," "yet such word or words shall be understood to include several persons as well as one person," "and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." Here there is no such repugnancy: it is clear that the object of the legislature was to provide that the duty should be paid only on the surplus of assets over debts; it was not meant that, where there were two probates, no allowance should be made for debts. Stat. 55 *G.* 3. *c.* 184. *s.* 38. required payment, in the first instance, on the amount of the whole assets, without deducting for debts: but sect 51 has a provision analogous to that now under discussion, for a return in respect of payment of debts. The answer offered by the Commissioners amounts to this: that they have divided the debts in the proportion of the assets, and have assigned the resulting portions accordingly to each province: and that, when such portions are severally deducted from the assets for which probate is granted in each province, the deductions will not, in either case,

produce a difference reducing the assets beyond the sum for which probate is granted. But there is no authority for such an apportionment. The ordinary was bound to satisfy the debts as long as he had any assets. [*Wightman* J. But, if the ordinary in the province of *Canterbury* had paid all the debts, there would have still been no deduction.] He could not lawfully pay all. [*Wightman* J. Why not? The debts have no locality: the doctrine of bona notabilia does not apply to debts owing by the deceased.] It might as justly be urged, on the other hand, that the ordinary in the province of *York* might have paid all the debts: and then the sum upon which duty was payable in *York* would be reduced to 4880*l.* 11*s.* 4*d.*, the difference between 7569*l.* 18*s.* 2*d.* and 2689*l.* 6*s.* 10*d.*

Sir *F. Thesiger*, contrà. The Commissioners do not wish to insist on the objection that a mandamus does not lie against them (*a*). [Lord *Denman* C. J. We will understand that that is waived for the present, and that the case is not to be a precedent in this respect.] The argument on the other side loses sight of the words in sect. 23 of stat. 5 & 6 *Vict. c.* 79., "for or in respect of which a probate or letters of administration shall have been granted." It cannot be said here that the debts have been paid out of the estate or effects for or in respect of which the *York* probate has been granted. It is sought to evade this difficulty by a supposition that the two probates have been paid for in respect of the aggregate of the assets: but that is negatived by the facts of the case. The Commissioners have attempted to meet

(*a*) See *Rex* v. *The Commissioners of Customs*, 5 *A. & E.* 380.

any possible injustice by dividing the debts rateably with the assets. No fairer mode can be suggested: but, even if this were not so, the writ shews no claim. Originally (*a*), the ordinary was not bound to pay debts at all; he applied the estate in pios usus. Afterwards, by the statute of *Westminster* the Second (1 stat. 13 *Ed.* 1.) *c.* 19., it was enacted that he should answer the debts. There is nothing to shew that he was bound to have recourse to any particular fund. Suppose, here, all the debts had been paid from the aggregate before either probate had been taken out, how could there have been a deduction from the aggregate of the assets in the two provinces, for the purpose of taking out probate? Under stat. 55 *G.* 3. *c.* 184. *s.* 51. an executor, by using despatch, could obtain a return, as now: but no provision appears in either statute for estimating in the mode suggested by the Crown. [*Wightman* J. Perhaps one might suggest cases in which the debt would be appropriated to the province, as if it were paid out of a bond which was bona notabilia there, or if one party took out probate in one province and another in the other, and one of them paid the debt.] That might raise a question: and there might perhaps be an apportionment by the will of the testator, as if he bequeathed to *A.* all his property in the province of *York*, and to *B.* all his property in the province of *Canterbury*, and directed that *A.* should pay all his debts. But here not even the executors have appropriated the several estates to the debts.

Watson, in reply. If the executors are entitled to an allowance for the debts, the only question is, whether

(*a*) See the account of the changes of the law in *Hensloe's Case*, 9 *Rep.* 36 *b.*

the Commissioners are justified in the apportionment which they have made. [*Coleridge* J. You are entitled to a return in respect of a difference which "would have occasioned a less stamp duty to be paid." How do you shew any thing that would have occasioned that, in the case of either of these probates?] The principle urged for the defendants would frequently prevent any return in respect of debts.

Lord DENMAN C. J. Before we consider the validity of the return to this writ, we are to see whether the writ itself shews a good claim. I understand that we are required to construe the twenty-third section of stat. 5 & 6 *Vict. c.* 79. In doing so, I find the greatest difficulty, I may say an impossibility, in discovering any thing which may support Mr. *Watson*'s claim for a return of what was in the first instance lawfully paid. One datum is entirely wanting: we have the other datum, the sums severally paid on the two probates; but we have no means of ascertaining what sums we are to deduct so as to satisfy the language of the act. Mr. *Watson* seems to suppose that a deduction is to be made from the sums paid on each probate, to be ascertained by first deducting the sum total of the debts from the sum of the amounts on which the two probates were paid. But there is nothing in the act to warrant this, nor any thing assigning a locality to the debts owing from the testator's estate. I am prevented therefore from giving the benefit intended by the legislature, if indeed there was such intention: in that case, I can only regret that it so happens that the language of the act fails here to carry the intention out.

Coleridge J. As to the return: I am not prepared to say that the Commissioners could have devised a more equitable mode of apportioning the debts. But, when they desire us to say what they ought to do, I really am not prepared with an answer. The case does not require it. The burthen of proof here is on the claimants: and they certainly have not shewn that it is incumbent on the Commissioners to adopt their mode of calculation.

Wightman J. I am of the same opinion. It is incumbent on the prosecutors to shew such a case as to reduce the gross amount to a sum which, if it were the amount on which the probate duty was payable, would require a less duty than that actually paid. They therefore should shew that, at the time when they took out the probate, or the two probates, they could, by allowing for the debts, have reduced the sum on which the probate was paid, and have paid a less duty. I am by no means satisfied that this would have been so in any view of the case. Mr. *Watson*'s argument is founded on the assumption that one probate would have been sufficient: and, no doubt, if that were so, he would be now entitled to a return. But the executors were obliged to take out two probates: and I am not at all satisfied that they were not liable to pay just the same duties on the two as they have in fact paid. The only reasonable way of meeting the difficulty seems to be that adopted by the Commissioners.

Erle J. On the demurrer to the return, we are first to look at the mandatory part of the writ. If that calls on the Commissioners to do what they are not bound to

do, we must give judgment for them. It appears to me that they are not bound to do what they are called on to do. The assumption on the part of the prosecutors is, that the two probates may be blended together; that, from the aggregate of the sums on which the duties are paid for the two, we are to deduct the aggregate of the debts; and that the executors are entitled to do this, in order to shew a right to a return of duty. But it appears to me that, before it can be shewn that duty ought to be returned, the executors ought, as the data for the calculation, to shew the sum in respect of which each probate was granted and paid, and an amount of debts in respect of that: there would then be a return payable in respect of that difference, if sufficient to reduce the sum within a lower duty. Perhaps the executors might have paid the debts, or some of them, out of the estate in one province: but, at any rate, they have not done this; they have paid them indiscriminately. The Commissioners have therefore pursued a fair and, as far as I can see, a legal course. The judgment must be for them, on the ground that the mandatory part of the writ calls on them to do what they are not bound to do.

Judgment for defendants.

Monday, November 16th.

DOE on the demise of WILLIAM DAVIES *against* JOHN DAVIES.

A will, dated before stat. 7 *W.* 4. & 1 *Vict. c.* 26., was produced on a trial in ejectment. It was signed with the name of the alleged devisor; but there was no proof that the signature was in his handwriting, or made by his authority. It was attested by two witnesses, deceased, whose handwriting was proved; and between their names was that of another witness, *J. P.*, who appeared to sign by his mark. A man in extreme old age, named *J. P.*, was called, who was supposed to be the witness: but he had no memory on the subject. The will had not been disputed for sixteen years after the death of the devisor.

Held that, upon this evidence, a jury might infer a due execution of the will under stat. 29 *C.* 2. *c.* 3. *s.* 5.

EJECTMENT for lands in *Radnorshire.*

On the trial, before *Rolfe* B., at the last *Radnorshire* assizes, a verdict was found for the plaintiff, leave being reserved to move for a nonsuit. It appeared that the lessor of the plaintiff claimed under the alleged will of a *John Davies*, deceased. The will was produced, signed with the name of the alleged devisor: but no evidence was given of his handwriting, nor that he had authorized any one to sign for him. The other facts of the case were as follows, according to the statement delivered by Lord *Denman* C. J. in giving judgment, post, p. 650. "The will was dated in 1828, and appeared to be attested by three witnesses. Two of them were dead: and their handwriting was proved: the third witness, named *John Phillips*, had signed with a mark only, and could not be identified. A witness was produced of that name, who was supposed by the plaintiff's lessor to have attested the will: but he was in extreme old age, and had no memory on the subject. There was therefore no direct evidence of the handwriting of this witness. But the name of *John Phillips* was between the two other names. The will did not appear to have been disputed for sixteen years after the testator's death. And the Judge left these, and other circumstances, to the jury, as presumptions that the

will had been properly attested: and the jury accordingly so found."

Chilton, in this term (*a*), moved for a nonsuit, or for a new trial on the ground of misdirection. There was no case for the jury, no evidence being given that *John Phillips* made the mark. The mark of the testator may well satisfy the requisition of stat. 29 *C.* 2. *c.* 3. *s.* 5., that the testator shall sign; and it was so held in *Baker* v. *Dening* (*b*). But the name of the attesting witness is added to prove this fact, which is not done, unless it appear in some way that he has vouched for it. In *Harrison* v. *Harrison* (*c*) it does not appear but that proof was given that the mark was made by the witness. In *Doe dem. Counsell* v. *Caperton* (*d*) there was also some proof to the same effect; but the practice of signing by marks was animadverted on by *Alderson* B. Here no such proof was given. The new statute, 7 *W.* 4. & 1 *Vict.* *c.* 26. *s.* 9., requires that the witnesses "shall attest and shall subscribe." The question is the more important here, because no direct proof was given of any signature by, or by the authority of, the testator: and the question, how far proof of the due execution is furnished by the attestation, has been the subject of much discussion; *Doe dem. Spilsbury* v. *Burdett* (*e*), *Doe dem. Harborne* v. *Lewis* (*g*).

Cur. adv. vult.

(*a*) *November* 4th. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

(*b*) 8 *A.* & *E.* 94.

(*c*) 8 *Ves.* 185.

(*d*) 9 *C.* & *P.* 112.

(*e*) 4 *A.* & *E.* 1. Judgment of Q. B. reversed in Exch. Ch.; *Doe dem. Spilsbury* v. *Burdett*, 9 *A.* & *E.* 936. Judgment of Exch. Ch. reversed in Dom. Proc.; *Burdett* v. *Doe dem. Spilsbury*, 10 *Cl.* & *F.* 340.; *S. C.* 6 *M.* & *G.* 386.

(*g*) 7 *C.* & *P.* 574.

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Doe dem. Davies v. Davies.

Lord Denman C. J. now delivered the judgment of the Court.

In this case a rule nisi to enter a nonsuit, or for a new trial, was moved for on the ground that there was no evidence to be left to the jury of a will being attested according to stat. 29 *C.* 2. *c.* 3. *s.* 5. (His Lordship then stated the facts, as in p. 648, antè.)

We are of opinion that the direction was right, and that the verdict should stand.

It has been decided that direct evidence of all the requisites required by stat. 29 *C.* 2. *c.* 3. *s.* 5. is not indispensable to prove the validity of a will, and that the attestation in the presence of the testator may be inferred from circumstances; *Croft* v. *Pawlet* (*a*), *Hands* v. *James* (*b*). And, if the jury may infer the presence of the testator without direct evidence, we see no reason why they may not infer that an apparent signature was real, and not forged, also without direct evidence. If the law were otherwise, many wills might be defeated, if they should be undisputed until the direct witnesses of their validity should have been removed by time. On the other hand, it is not probable that the jury or the Judge would dispense with the production of direct evidence unless the omission was satisfactorily explained.

Rule refused (*c*).

(*a*) 2 *Str.* 1109. (*b*) 2 *Com. Rep.* 531.
(*c*) See *Harrison* v. *Elvin*, 3 *Q. B.* 117.

In the Matter of SHUTTLEWORTH.

Tuesday, November 17th.

A WRIT of habeas corpus issued, directed to *John Gideon Millingen*, commanding him to bring up the body of *Martha Eliza Rhoda Shuttleworth*, together with the cause &c.

Return. "That the said *Martha Eliza Rhoda Shuttleworth*" "was delivered into my custody on the 9th day of *August* now last past, and hath from thence been, and still is, in my custody: and that the cause of her being taken into my custody, and detained in my custody from thence hitherto, was, and ever since has been, and still is, that she, the said *M. E. R. S.*, at the time of her being taken and received into my custody as aforesaid, was, and ever since has been, and still is, a person of unsound mind, memory and understanding, and incapable of governing herself or her property, or managing her affairs, and unfit and unsafe to be at large. And I hereby further humbly certify and return that the house in which the said *M. E. R. S.* hath been detained, ever since she hath been in my custody as aforesaid, is a house called" &c., "situate at" &c.; "and that the said house," "before and at the time of my receiving the said *M. E. R. S.* into my custody as aforesaid, was, and still is, a house duly licensed

Under stat. 8 & 9 *Vict. c.* 100. *ss.* 45, 46. schedules (B.), (C.), an order for confinement of a lunatic in a licensed house is not necessarily invalid if the party giving it does not insert statements as to all the particulars in schedule (B.), or state expressly that he does not know them.

It is a sufficient statement, as to the "special circumstances," "preventing the insertion of any of above particulars," that the lunatic is "constantly watched by an attendant whom she fears."

Under schedule (C.) a medical certificate is sufficient which states, as grounds for the opinion that the party is insane, "that she labours under delusions of various kinds;" and "that she is dirty and indecent in the extreme."

A medical practitioner, signing the certificate, instead of the words "from the following fact or facts," inserted, "from the conversation I have had this day with the said" lunatic. Held sufficient, without more.

Where, on return to a habeas corpus, it is stated that the party confined is of unsound mind, and unfit and unsafe to be at large, the Court will not order such party to be discharged from a licensed house, though the order and certificates be not such as to fulfil the requisites of stat. 8 & 9 *Vict. c.* 100. *ss.* 45, 46., and schedules (B.), (C.).

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by her Majesty's Commissioners in Lunacy to be kept by me, the said *J. G. Millingen*, and my partner in business *John Parkin*, a member of the Royal College of Surgeons, as a house for the reception of private lunatics, according to the form of the statute" &c. "And I hereby further humbly certify and return that, at the time of my receiving the said *M. E. R. S.*. into my custody as aforesaid, I received with her an order for her reception under the hand of *J. C. Rowlatt;* which order is as follows.

"I, the undersigned, hereby request you to receive *Martha Elizabeth Rhodes*, a person of unsound mind, as a patient into your house. Subjoined is a statement respecting the said .

"Signed. Name - - - -	*J. C. Rowlatt*, M. A.
Occupation (if any) - - - -	Assistant Minister of *St. Peter's, Pimlico.*
Place of abode - - - -	36. *Lower Belgrave Street.*
Degree of relationship (if any), or other circumstances of connection with the patient - - - -	As clergyman of the parish, finding her in a most deplorable and indecent condition."

Name of patient, with Christian name at length - - - -	*Martha Elizabeth Rhodes.*
Sex and age - - - - -	Female.
Married, single or widowed - -	Single.
Condition of life, and previous occupation (if any) - - - -	Derives her income from a settlement upon her.
Previous place of abode - - -	*Upper Eaton Street, Pimlico.*
Religious persuasion, so far as known.	
Duration of existing attack - -	
Whether first attack - - -	
Age (if known) on first attack -	
Whether subject to epilepsy - -	
Whether suicidal or dangerous to others - - - - -	
Previous places of confinement (if any) - - - - - -	

Whether found lunatic by inquisition, and date of commission - -	
Special circumstances (if any) preventing the patient being examined, before admission, separately, by two medical practitioners - - -	
Special circumstances (if any) preventing the insertion of any of above particulars - - - -	Being constantly watched by an attendant whom she fears.

Signed. *Name* - - - - *J. C. Rowlatt.*

Dated this fourth day of *August*, 1846.

To Messrs. *Parkin* and *Millingen*, Proprietors of *York House, Battersea.*"

"And that I did also, at the same time, receive with the said *M. E. R. S.* two medical certificates, one under the hand of one *Thomas Willmott*, and the other under the hand of one *William Griffith*. Which said medical certificate of the said *Thomas Willmott* is as follows.

"I, *Thomas Willmott*, being a surgeon and apothecary duly qualified, hereby certify that I have this day, separately from any other medical practitioner, visited and personally examined *Martha Elizabeth Rhodes*, the person named in the accompanying statement and order; and that the said *M. E. R.* is a person of unsound mind, and a proper person to be confined; and that I have formed this opinion from the following fact; viz. that she labours under delusions of various kinds; that she is dirty and indecent in the extreme.

(Signed) Name. *Thomas Willmott.*

Place of abode. 17. *Upper Eaton Street.*

Dated this 4th day of *August* 1846."

And which said medical certificate of the said *William Griffith* is as follows.

"I, *William Griffith*, being a surgeon, hereby certify that I have this day," &c. (as in the other certificate):

"and that I have formed this opinion from the conversation I have had this day with the said *Martha Elizabeth Rhodes.*

Signed. Name. *William Griffith.*

Place of abode. 31. *Lower Belgrave Street.*

Dated this 4th day of *August*, 1846."

"And I hereby further humbly certify and return that the said person in the said order and medical certificates called *Martha Elizabeth Rhodes*, and the said person in the said writ hereunto annexed called *Martha Eliza Rhoda Shuttleworth*, are one and the same person, and not other or different. And that the said *M. E. R. S.* was received by me into my custody on the said 9th day of *August* last, under and by virtue of the said order and medical certificates, and under the authority of the statute 8 & 9 *Vict. c.* 100.

And I further humbly certify and return to the annexed writ to me directed, that above are the causes why I received into my custody, and have hitherto detained, and still do detain, the said *M. E. R. S.* in my custody; and that I now have the body of the said *M. E. R. S.* before our Lady the Queen," &c.

J. H. Parry now moved that *M. E. R. Shuttleworth* should be discharged. The order and certificates are insufficient, not fulfilling the requisites of stat. 8 & 9 *Vict. c.* 100. (*a*) *s.* 45., Schedules (B.) and (C.), and

(*a*) Stat. 8 & 9 *Vict. c.* 100. *s.* 45. enacts: "That no person (not a pauper), whether being or represented to be a lunatic, or only a boarder or lodger, in respect of whom any money shall be received or agreed to be received for board, lodging, or any other accommodation, shall be received into or detained in any licensed house, and no person (not a pauper) shall be received into or detained as a lunatic in any hospital, without an order under the hand of some person according to the form

s. 46. The mandatory part of the order may be proper as far as it goes: but the required particulars are not sufficiently stated. As to several there is no statement

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and stating the particulars required in schedule (B.) annexed to this act, nor without the medical certificates, according to the form in schedule (C.) annexed to this act, of two physicians, surgeons, or apothecaries who shall not be in partnership, and each of whom shall separately from the other have personally examined the person to whom it relates, not more than seven clear days previously to the reception of such person into such house or hospital, and shall have signed and dated the same on the day on which such person shall have been so examined; and every person who shall receive or detain any such person as aforesaid in any such house or hospital as aforesaid without such order and medical certificates as aforesaid, and any physician, surgeon, or apothecary who shall knowingly sign any such medical certificate as aforesaid which shall untruly state any of the particulars required by this act, shall be guilty of a misdemeanor."

Sect. 46. "Provided always, and be it enacted, That every physician, surgeon, or apothecary signing such certificate shall specify therein any fact or facts (whether arising from his own observation or from the information of any other person) upon which he has formed his opinion that the person to whom such certificate relates is a lunatic or an insane person, or an idiot, or a person of unsound mind."

Schedule (B.) (referred to by sect. 45.).

"Order for the reception of a private patient.

"I, the undersigned, hereby request you to receive *A. B.* a lunatic [*or* an insane person, *or* an idiot, *or* a person of unsound mind], as a patient into your house [or hospital]. Subjoined is a statement respecting the said *A. B.*

(Signed) *Name.*
Occupation (if any).
Place of abode.
Degree of relationship (if any), or other circumstances of connexion with the patient.

Name of patient, with Christian name at length.
Sex and age.
Married, single, or widowed.
Condition of life, and previous occupation (if any).
Previous place of abode.
Religious persuasion, so far as known.

at all, none even that they are unknown to the party making the order. And all that is said as to the "special circumstances (if any) preventing the insertion of any of above particulars," is "being constantly watched by an attendant whom she fears." This shews no reason for the absence of the insertion: as to some of the particulars, it is impossible that such a circumstance can have prevented the insertion; and it has not, in fact, prevented the inquiries and conversation upon which *Griffith*'s certi-

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Duration of existing attack.
Whether first attack.
Age (if known) on first attack.
Whether subject to epilepsy.
Whether suicidal or dangerous to others.
Previous place of confinement (if any).
Whether found lunatic by inquisition, and date of commission.
Special circumstances (if any) preventing the patient being examined, before admission, separately, by two medical practitioners.
Special circumstances (if any), preventing the insertion of any of above particulars.

(Signed) *Name.*

Dated this day of one thousand eight hundred and .

To proprietor [*or* superintendent] of [*describing the house or hospital by situation and name, if any.*]"

Schedule (C.) (referred to by sect. 45.)

Form of Medical Certificate in the case of private patients.

"I being a physician *or* surgeon, *or* an apothecary, duly authorised to practise as such, hereby certify, that I have this day, separately from any other medical practitioner, visited and personally examined *A. B.*, the person named in the accompanying statement and order, and that the said *A. B.* is a lunatic [*or* an insane person, *or* an idiot, *or* a person of unsound mind], and a proper person to be confined, and that I have formed this opinion from the following fact or facts; viz.

(Signed) *Name.*
Place of abode.

Dated" &c.

ficate is founded. This application was originally made in the Bail Court, before *Patteson* J., who referred the case to the full Court, but expressed his opinion that, where no statement is annexed to any particular, the words "not known," or something equivalent, should be inserted. [*Coleridge* J. I may not understand, more than you do, how the special circumstances at the end prevented the insertion of the particulars: but can we see that the statement is not true?] Suppose the only statement had been that the party making the order did not choose to inquire. [*Coleridge* J. That, on the face of it, would have been an insufficient reason. But suppose Mr. *Rowlatt* had said that the lunatic was dumb and an entire stranger to him.] He should at least have made inquiry. [*Coleridge* J. Suppose he had added that the lunatic had only just come into the neighbourhood, and that he had not the means of making inquiry.] Then he would not be warranted in depriving a party of liberty. [*Erle* J. The assumption is that the party is manifestly lunatic. *Coleridge* J. Some of the particulars can be stated only by a medical practitioner.] That is not so as to all. Further, the certificates are insufficient. The provisions of stat. 8 & 9 *Vict. c.* 100. *ss.* 45, 46. appear to have been enacted in consequence of the insufficiency of those of stat. 2 & 3 *W.* 4. *c.* 107. *s.* 28. and Schedule (C.), which required merely a certificate that the party was of unsound mind and a proper person to be confined. The first certificate gives, as the ground of *Willmott*'s opinion, only the facts that the party "labours under delusions of various kinds," and "is dirty and indecent in the extreme." The first of these is indefinite, and states little else than a conclusion as to the insanity: the delusions should be

specified. As to habits of dirt and indecency, they may, when coupled with other facts, shew insanity; but not when standing alone. [*Coleridge* J. Suppose from such facts a medical man infers insanity. Lord *Denman* C. J. The protection intended is double, against improper confinement and against danger from a lunatic being unrestrained.] But the Court ought to have the means of judging: some facts, at any rate, would be insufficient. In the second certificate the words of the statute are departed from. The medical practitioner was not authorised to strike out the words "fact or facts," selected by the legislature, and substitute his own. Nor can a conversation be a fact of the kind contemplated by the legislature. Besides, the particulars of the conversation not being shewn, the statement really amounts only to a repetition of the opinion that the party appeared to be insane. If this be a compliance with the statute, the alleged lunatic is wholly in the power of the medical practitioner. [*Coleridge* J. By sects. 61, 62, &c., the houses must be visited: so that the power is not wholly with the medical practitioner. Besides, I am not prepared to concede that, if the certificates be deficient, we are to discharge. The return states that the lunatic is unfit and unsafe to be at large. I recollect a case which was twice before me. A magistrate had improperly sent a lunatic to the *Hanwell* asylum. I remanded the party till I could be satisfied as to her state; and I found that she ought to be confined. The case is somewhat analogous to that of an insufficient commitment; where, if we are satisfied that the party ought to be committed, we recommit.] Perhaps the analogy of a conviction is closer. [*Coleridge* J. Your argument seems to come to

this: that, although we saw that a party was a raving and dangerous lunatic, we ought to discharge him if the order or certificates were deficient.] In that case, the Court would be under the necessity, however inconvenient, of allowing the lunatic his common law right of liberty. [Lord *Denman* C. J. Is not the confining of a dangerous lunatic also founded on common law principles?] That would give any individual a right to exercise his discretion as to confining an alleged lunatic. [*Coleridge* J. In strictness, the lunatic should be personally in Court.] The allegation in the return ought not to be conclusive. [*Erle* J. Under stat. 56 *G.* 3. *c.* 100. *s.* 3. you might have disputed its truth.] It is at any rate important that the Court should now decide upon the legality of the certificates. [*Erle* J. If there has been an unauthorised certifying or receiving, that is a misdemeanour.] The return alone is now before the Court. If nothing were returned but that the party was a dangerous lunatic, the Court would surely, in order to follow out the policy of the legislature, hold that insufficient. The party might be discharged on this return and immediately placed in custody by regular proceedings. It is clear that *Patteson* J., in the case *In re Fell* (*a*), considered the question, whether the lunatic should be discharged, to be the same with the question whether the order and certificates were sufficient.

Sir *John Bayley*, contrà, was stopped by the Court.

Lord DENMAN C. J. I feel no difficulty, except the doubt expressed upon it by my brother *Patteson*. But we are bound to form our own opinion, espe-

(*a*) 3 *Dowl. & L.* 373.

cially in a case which is of vast importance, and exceptional, and in which, unless there were peculiar precautions provided, there would be no security either to the public or to the unfortunate class of persons who are the object of the provisions. It is notorious that formerly there were many cases of oppression: and acts of parliament were passed to prevent their taking place. Stat. 2 & 3 *W.* 4. *c.* 107. was found not to be satisfactory. The late act has provided, with extreme care and tenderness, to give to the patients all that is not dangerous to themselves or the public. A party is to issue an order: no particular person is pointed out: no special character is assigned: but a party is to act who has an opportunity of observation. Nothing can be more proper than the conduct of a clergyman of a parish who, finding a person that ought to be confined, takes on himself to issue such an order. The language of the act is peculiar. It directs that no person shall be received or detained without an order, which is to contain statements as to certain particulars. It appears, therefore, to render the reception and detainer unlawful unless such particulars appear. Now here, I think, they do appear. As to some, there are express statements. As to others, we must understand that they are not answered because the party making the order has no knowledge: the omission is equivalent to a statement that he does not know. Then special circumstances are stated which prevent the insertion of some of the particulars of the lunatic's previous history. I think these circumstances perfectly sufficient; because, if there be any one present who exercises a controul over one of a deranged mind, it is a necessary consequence that a third party

cannot expect to obtain full information. The order is undoubtedly made bonâ fide: and I think it sufficient. We come then to the certificates. As to them, the language of the statute differs from that used in respect of the order. Sect. 46 is directory. And the reason, perhaps, of the legislature using only terms of direction is that the parties to whom the section relates are persons of professional skill. The first certificate states, as the ground of the surgeon's opinion that the female is insane, that she labours under delusions of various kinds, and is dirty and indecent in the extreme. It never can have been meant by the legislature that the particular details of such matters as these should be stated. Often there are no means by which any tribunal could determine whether what are termed delusions were so or not: it might be mere matter of opinion. Now the act refers this to the skill and knowledge of professional persons. It is quite enough that they speak to the existence of delusions. The dirt and indecency might also be quite enough to justify a professional person in coming to the opinion of insanity. The second certificate is less formal. I think it would have been better if there had been no deviation from the form in the act: but what we do find is manifestly equivalent to the language of the act. If the surgeon had stated, as the fact, "a conversation from which I am of opinion that she is insane," that, considering who he is, would have shewn the sort of fact required; because credit is given to him, as a skilful person, by the act of parliament. Nothing done by these documents is final: an inquiry may still be gone into: the object of the legislature rather seems to be to point out sources of evidence, and not to require par-

ticulars, the sufficiency of which must be judged of by those to whom it refers the question. I think, therefore, that these certificates are sufficient. But I go a little farther. If the Court thought that a party, unlawfully received or detained, was a lunatic, we should still be betraying the common duties of members of society if we directed a discharge. But we have no power to set aside the order, only to discharge. And should we, as judges or individuals, be justified in setting such a party at large? It is answered, that there may be a fresh custody. But why so? Is it not better, if she be dangerous, that she should remain in custody till the Great Seal or the commissioners act? Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing: and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be most thankful.

COLERIDGE J. I am of the same opinion. Although the act of parliament is a novelty, yet my lord has gone into the question so fully that it is quite unnecessary for me to say more.

WIGHTMAN J. I am of the same opinion: and I refrain from adding more for the reason given by my brother *Coleridge*.

ERLE J. I am of the same opinion. I will make but one remark. The prohibition is, that no one shall be received or detained in a licensed house as a lunatic, without an order and certificates. It is not a general

prohibition against confining lunatics. That is left as at common law.

The party was remanded.

Sir *John Bayley* applied for costs.

Lord DENMAN C. J. I do not see what power we have to give them.

The QUEEN *against* The Inhabitants of ANDERSON.

Wednesday, November 18th.

ON appeal against an order of two justices for the removal of *James Furber*, and his wife and child, from the parish of *Lytchet Minster* to the parish of *Anderson*, both in *Dorsetshire*, the sessions confirmed the order, subject to the opinion of the Court of Queen's Bench on the following case.

The sixth and material ground of appeal was as follows.

"That the said paupers were, at the time of granting the said order, and are now, legally settled in the parish of *Chaldon Herring* in the said county of *Dorset*, by reason of the pauper the said *James Furber* having for many years, to wit the years 1832, 1833 and 1834, and afterwards, served the offices of assessor and collector of the land tax, and also the assessed taxes, in the tithing of *Chaldon West* in the parish of *Chaldon Herring*; and to which said offices he was duly and legally appointed;

The Court will take notice that the offices of assessor and collector of the land tax and assessed taxes are "public annual" offices, within the meaning of stat. 3 *W. & M. c.* 11. *s.* 6.

A statement, in a ground of appeal, that the pauper "served" the offices in question, "to which said offices he was duly and legally appointed," imports that he served those offices "for himself and on his own account" within the meaning of stat. 3 *W. & M. c.* 11. *s.* 6.

A statement, in a ground of appeal, that the pauper served the offices for certain specified years, "*during which years* he was an inhabitant and resident" in *C.*, imports that he inhabited and resided in *C.* during the whole of those years.

and during which years he was an inhabitant and resident in the said parish of *C. H.*, and for some time afterwards.

At the trial, the respondents called the pauper *James Furber*, and proved a settlement in the appellant parish by renting a tenement from 1816 to 1823. The appellants then proposed to cross examine the pauper with a view to the proof of a subsequent settlement obtained by him in the parish of *Chaldon Herring* by serving the office of collector of land tax, during the years 1832, 1833 and 1834, in the same parish of *C. H.*, as alleged in the said ground of appeal. Whereupon it was objected, for the respondents, that the appellants were precluded from giving any evidence of such settlement by reason of the insufficiency of the statement in the said sixth ground of appeal, inasmuch as it did not set forth that it was a "public annual office" which the pauper had served, or that he served it for himself and on his own account; and inasmuch as it did not appear therefrom that he had resided forty days in *Chaldon Herring* during the time of his serving such office in that parish.

After argument, the Court held the objection good; but permitted the appellants to prove, and they did in fact prove, that the pauper, subsequently to his obtaining a settlement in the appellant parish, gained a settlement in the said parish of *Chaldon Herring* by serving the office of collector of land tax therein during the years in the said sixth ground mentioned, and that the said office was a public annual office, to which he was duly and legally appointed, and that he served it for himself and on his own account, and resided in the said parish of *C. H.* throughout the period of his said service.

This proof having been gone through, the Court confirmed the order, subject to the opinion of this Court.

The question for this Court was, whether the statement in the said sixth ground of appeal was sufficient to let the appellants into proof of the settlement alleged therein. If the Court should be of opinion that it was sufficient, the order of sessions and order of removal were to be quashed: if not, the order of sessions to be confirmed.

Lucena and *Efooks* in support of the order of sessions. Stat. 3 *W. & M. c.* 11. *s.* 6. confers a settlement on any person inhabiting a town or parish who "shall for himself and on his own account execute any public annual office or charge in the said town or parish, during one whole year." It is not stated in this ground of appeal that the office was annual, or that *Furber* executed it for himself, and on his own account: and the statement is, therefore, imperfect, as a statement of settlement by hiring and service is imperfect where it does not appear that the party was unmarried and without child or children at the time of the hiring; *Regina* v. *Wymondham* (*a*), *Regina* v. *The Recorder of Leeds* (*b*). The pauper here might have served the office by deputy, in which case he might, if a certificate man, have gained a settlement by virtue of stat. 9 & 10 *W. 3. c.* 11., but not otherwise; *Rex* v. *St. Maurice in Winchester* (*c*). Or he might have served as deputy to another. This affords an additional reason why the statement should have been more particular as to the fact that the execution was on his own account. The statement, that

(*a*) 2 *Q. B.* 541. (*b*) 2 *Q. B.* 547.
(*c*) 1 *Burr. S. C.* 27., per *Lee* J., p. 34.

the pauper was an inhabitant of the parish "during" the year for which he served the office, does not necessarily import an inhabitancy for forty days. To support this latter construction, it must be said that the word "during" necessarily imports the whole year; but that is not its meaning. When an event, occupying a shorter period of time, is said to take place in the course of a longer period, the word "during" is properly used; not else; thus, to say that the cases in the Crown paper were heard "during" *Michaelmas* Term would not imply that nothing else was heard. And, therefore, the legislature in stat. 8 & 9 *W.* 3. *c.* 30. *s.* 4. enacts that the service to confer a settlement under a hiring shall last, not during a year, but "during the space of one whole year." [Lord *Denman* C. J. That instance makes against you. It shews that the legislature used the word "during" as equivalent to "for the whole time."] *Regina* v. *Honley* (*a*) shews the

(*a*) 1 *New Sess. Ca.* 397. *November* 20th, 1844.

In that case the examinations relied upon by the respondents as establishing a settlement by renting land contained the following statement. "Thirty nine years ago," "I went to live in the township of *Honley*." "In or about the year 1814 I removed" &c. "I then occupied and resided in a cottage at *Cocking Steps Mill*, in which I have lived ever since." "In the year 1818, or in the spring of the year 1819, I hired" &c. (he then stated a renting not material to the decision); "during all which time I resided and inhabited in the said township of *Honley* at *Cocking Steps Mill* aforesaid." "In the year 1821, whilst I resided at the same place, I rented and occupied between three and four acres of land at *Scot Gate Head*, in *Honley* aforesaid, of one *John Todd*, of" &c., "of the annual value of 7*l.*, and for which I paid 7*l.* rent for the same for several years. In the year 1821, and at the same time that I so occupied the land of *John Todd*, I also rented and occupied three acres of land at *Scot Gate Head* aforesaid of one *John Bottomley*, of" &c., "of the annual value of 7*l.*, at 7*l.* rent, which I occupied for one year, and then gave it up, in the year 1822. The cottage at *Cocking Steps Mill* aforesaid, which I lived in during all the time I so occupied the land of *John Todd* and *John Bottomley* respectively, was worth 3*l.* per annum."

strictness with which adverbs of time are to be construed.

Stock, contrà, was stopped by *The Court*.

Lord DENMAN C. J. The principle upon which this Court has proceeded in its recent decisions on objections of this kind has been, that the statement of the settlement must be according to the terms of the act creating it, and leave nothing to inference. When the terms of the act are not literally followed, the question must of course arise, in every case, whether they are or are not substantially followed: and the solution of this question must often rest on fine-drawn and minute distinctions. In the present instance, I think the terms of the act are substantially followed. As to the first objection, it must, no doubt, appear that the office executed is a public annual one. But we know the offices of assessor, and collector of land tax, and assessed taxes, to be such by acts of parliament (*a*). As to the second objection, the statement is that the pauper was "duly and legally appointed" to the offices which he executed: this primâ facie imports that he served them for himself, and on his own account: it is unnecessary to negative an inference which

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The Court (Lord *Denman* C. J., *Williams*, *Coleridge* and *Wightman* Js.) held the examination defective, as not shewing that the party occupied both the portions of land together for the full space of a year, residing in *Honley* for forty days of such year; and they said that "at the same time" did not mean "all the said time."

Hall in support of the order of sessions; *Pashley* and *Overend* contrà.

(*a*) See stat. 38 *G.* 3. *c.* 5. *s.* 7., and *Rex* v. *The Commissioners of the Land Tax in St. Martin in the Fields*, 1 *T. R.* 146. As to the offices of assessor and collector of land tax, see stat. 48 *G.* 3. *c.* 141. *s.* 1.

is against the obvious sense of the words. With respect to the words "during which years," it appears to me that in their strict and proper legal sense they mean for the whole of those years; and that the other meaning, namely, "at some time in those years," is colloquial and incorrect.

Coleridge and Wightman Js. concurred.

Erle J. I think the requisites sufficiently appear by necessary intendment: for I cannot accede to the doctrine that "necessary intendment" fairly means an intendment which cannot by possibility be misinterpreted.

Rule of sessions quashed (*a*).

(*a*) Reported by *H. Merivale*, Esq.

VAN BOVEN'S Case.

Thursday, November 19th.

LUSH, on this day, obtained a rule (*a*) for a habeas corpus directed to the keeper of the House of Correction at *Louth*, in *Lincolnshire*, to bring up the

The Smuggling act, 8 & 9 *Vict. c.* 87. *s.* 2., enacts that any vessels therein described, which shall be found to have been within certain distances respectively of the coast of the United Kingdom, &c., having on board tobacco not being in a cask &c. containing 300 lbs. weight, &c., or any tobacco stalks, or other articles specified, shall be forfeited.

Sect. 4 enacts that nothing in the act contained shall render any vessel of 120 tons burden liable to forfeiture on account of any tobacco coming from certain specified places in packages of certain weights respectively, nor to render any vessel of 60 tons burden liable on account of other articles mentioned in sect. 2, under circumstances which are severally stated in this clause.

Sect. 50 enacts that every subject of Her Majesty who shall be found to have been on board any vessel liable to forfeiture under this act for being found to have been within certain distances mentioned in this act, having on board, or having had on board, such goods as subject the vessel to forfeiture, and every person not being a subject &c., who shall be found to have been on board any vessel liable to forfeiture for any of the causes last mentioned within one league of the coast of the United Kingdom, "shall, upon being duly convicted of any of the said offences before any two justices of the peace, be adjudged by such justices" to be imprisoned &c. Proviso, that any person proving to the satisfaction of any justice or justices before whom he may be brought that he was only a passenger, and had no interest in the vessel or any goods on board, shall be discharged.

Held by *Coleridge* and *Erle* Js., Lord *Denman* C. J. dubitante, that, in a conviction, under sect. 50, for being found in a vessel liable to forfeiture under sect. 2, as having on board prohibited goods, it was unnecessary to negative the exemptions in sect. 4.

Semble, per Lord *Denman* C. J., that, where a statute imposes penalties for an act indifferent in its own nature, and which, by the statute itself, is not an offence if done under circumstances there specified, the informer must shew it to be criminal, and for that purpose negative the circumstances under which (whether they be embodied in the penal clause or not) criminality does not attach.

By sect. 103, every warrant of commitment under this or any act relating to the customs shall be deemed valid, if it set forth an offence in the words of the act; and no such warrant shall be held void for any defect therein, if it allege a conviction of such offence, and if it appear to the Court before which the warrant is returned that the conviction proceeded on good and valid grounds. *Semble*, that, if, on return of such warrant to a habeas corpus, the grounds of conviction are relied upon in answer to an allegation of defect in the warrant, it lies upon the party supporting the conviction to prove those grounds, and that, to do this, he must bring up the depositions by certiorari.

Sect. 58 enacts (for the purpose of giving time to prepare informations, convictions, &c.) that, when any person shall have been detained by an officer (empowered by sect. 50) for any offence against this or any other act relating to the customs, and shall have been taken before a justice, if it appear to such justice that there is cause to detain, he is thereby authorised and required to order such person to be detained a reasonable time, and, at the expiration of such time, to be brought before any two justices, who are thereby authorized and required finally to hear and determine the matter. Held, that, although the justice detains the party for an unreasonable time, and he is then brought before two justices and convicted, the conviction is still valid, the jurisdiction to convict depending on sect. 50, and not being affected by the improper proceeding under sect. 58.

(*a*) In the Bail Court, before *Patteson* J.

body of *James Van Boven*, then in his custody. On a subsequent day in this term (*a*) the prisoner was brought up, and the following warrant returned, as containing the cause of commitment.

Borough of *Grimsby*, Parts of *Lindsey*, County of *Lincoln*. } To wit. — To *James Watt*, an officer of customs, and to *John Joseph Brian*, the gaoler or keeper of the House of Correction at *Louth* in the parts of *Lindsey*, in the county of *Lincoln*.

Whereas *James Van Boven* has this day been duly convicted before us, *William Brooks* Esquire, Mayor, *Thomas Bell* and *Charles Perceval Loft*, Esquires, three of her Majesty's justices of the peace in and for the said borough &c., in the said parts &c. and county &c., upon the information of *Samuel Mayor*, Esquire, an officer of customs who was directed by the Commissioners of her Majesty's Customs to prefer the same: For that, within six months now last past, that is to say on &c. (19th *August* 1846), he, the said *James Van Boven*, not being a subject of her Majesty, and being liable to be detained for the offence therein mentioned, was found on the high seas within one league of the coast of the United Kingdom, to wit within one league of the coast of the county of *Lincoln*, on board a certain vessel then and there liable to forfeiture under the provisions of a certain act relating to the customs, made and passed in A. D. 1845 (*b*), intituled "An act for the prevention of smuggling," for that the said vessel, being a foreign

(*a*) *November* 24th. Before Lord *Denman* C. J., *Coleridge* and *Erle* Js.

(*b*) 8 & 9 *Vict. c.* 87.

vessel, was, on &c. (19th *August* 1846), found on the high seas aforesaid within one league of the coast of the United Kingdom, to wit within one league of the coast of the county of *Lincoln*, the said vessel then and there having on board, whilst the said vessel was within the said space of one league from the said coast, and whilst the said *J. V. B.* was on board thereof, divers to wit 2688 pounds weight of tobacco stalks, contrary to the form of the statute in that case &c.: And whereas the said *J. V. B.* was, on the day and year last aforesaid, for the offence aforesaid, detained by one *James Watt*, being then and there an officer of customs, and by him taken, brought and carried into a certain place on land in the United Kingdom, to wit into the parish of *Great Grimsby*, in the said borough &c., in the said parts &c., in the said county &c.: And whereas we, the said justices, did adjudge that the said *J. V. B.* should for his said offence be imprisoned in the House of Correction at *Louth*, in the parts and county aforesaid, and be there kept to hard labour for the term of six calendar months: These are therefore &c. (The warrant then required *James Watt* forthwith to take and convey *J. V. B.* to the said House of Correction, and deliver him into the hands of the gaoler or keeper thereof: And the justices thereby authorized and required *J. J. Brian*, the gaoler or keeper &c., to receive and take *J. V. B.* into his custody, and to keep him for the said term of six calendar months to hard labour.)

Given &c., at *Great Grimsby*, in the said borough &c., this 1st day of *September*, A. D. 1846. (Signed and sealed by the three justices.)

The return having been read,

Lush moved that the prisoner might be discharged.

The grounds stated in moving for the writ, and now relied upon (*a*), were: 1. That the warrant did not set forth a sufficient conviction under stat. 8 & 9 *Vict. c.* 87. *s.* 50. (*b*). 2. (On affidavit): That the prisoner was arrested by an officer of the customs, and taken

(*a*) *Lush*, in moving, objected to the warrant, as not shewing that the land to which the prisoner had been first brought was within the borough of *Great Grimsby*; and he cited *In the matter of Peerless*, 1 Q. *B.* 143. But this objection was afterwards waived, there being no ground for it in the language of the statute now in question.

(*b*) Stat. 8 & 9 *Vict. c.* 87. *s.* 2. "And be it enacted, That if any vessel not being square rigged, or any boat, either belonging in the whole or in part to Her Majesty's subjects, or having half the persons on board subjects of Her Majesty, shall be found or discovered to have been within 100 leagues of the coast of the United Kingdom; or if any vessel either belonging in the whole or in part to Her Majesty's subjects, or having half the persons on board subjects of Her Majesty, or if any foreign vessel not being square rigged, or any foreign boat, in which there shall be one or more subjects of Her Majesty, shall be found or discovered to have been within four leagues of that part of the United Kingdom which is between the *North Foreland* on the coast of *Kent* and *Beachy Head* on the coast of *Sussex*, or within eight leagues of any other part of the coast of the United Kingdom; or if any foreign vessel or boat shall be found or discovered to have been within one league of the coast of the United Kingdom; or if any vessel or boat shall be found or discovered to have been within one league of the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man* respectively, or within any bay, harbour, river, or creek of or belonging to any one of the said islands, any such vessel or boat so found or discovered, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tea exceeding six pounds weight in the whole, or any tobacco or snuff not being in a cask or package containing 300 pounds weight of tobacco or snuff at least, or being separated or divided in any manner within any cask or package, or any tobacco stalks, or any cordage or other articles adapted and prepared for slinging or sinking small casks, or any casks or other vessels whatsoever of less size or content than twenty gallons, of the description used for the smuggling of spirits, then and in every such case the said spirits, tea, tobacco, or snuff, and tobacco stalks, together with

before magistrates, on the 21st of *August*, when the magistrates ordered him to be detained in the town gaol till the 31st, and to be then brought up for examination: that he was then brought before justices, who adjourned the hearing till the next day, when the commitment took place; that such detention was not for a reasonable time, within sect. 58 of the statute; and, consequently, that on *September* 1st the prisoner was not lawfully in custody, and the magistrates had not jurisdiction to commit him.

Sir *J. Jervis*, Attorney General, Sir *D. Dundas*, Solicitor General, and *Lawes* shewed cause. The first objection is met by sect. 103 of stat. 8 & 9 *Vict. c.* 87., which enacts that every conviction or warrant of com-

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the casks or packages containing the same, and the cordage or other articles, casks, and other vessels of the description aforesaid, and also the vessel or boat, shall be forfeited."

Sect. 4 enacts: "That nothing herein contained shall extend to render any vessel of the burden of 120 tons or upwards liable to forfeiture on account of any tobacco or snuff coming direct from the *East Indies*, and being in packages each containing 100 pounds weight of tobacco or snuff at least, or on account of any cigars being in packages each containing 100 pounds weight of cigars at least, or on account of any tobacco the produce of *Mexico*, *Columbia*, the continent of *South America*, or of the islands of *Saint Domingo* or *Cuba*, coming direct from those places respectively, or from the warehouse in any *British* possession in *America*, in packages each containing eighty pounds weight of tobacco at least, or on account of any negrohead tobacco the produce of and coming direct from the *United States* of *America*, in packages each containing of such tobacco 150 pounds weight at least, or on account of any tobacco of the dominions of the *Turkish* empire which may be separated or divided in any manner within the outward package, such outward package being a hogshead, cask, chest, or case containing of such tobacco 300 pounds weight at least, nor to render any vessel of 60 tons burden or upwards liable to forfeiture on account of any tea, or of any spirits in glass bottles or in stone bottles, not exceeding the size of quart bottles, such tobacco,

mitment "for any offence committed against this or any act or acts relating to the customs" "shall be deemed valid and sufficient, in which the offence for

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snuff, cigars, tea, and spirits being really part of the cargo of such vessel, and included in the manifest or other papers of such vessel enumerating or describing the cargo thereof, nor to render any vessel liable to forfeiture on account of any spirits, tea, or tobacco really intended for the consumption of the seamen and passengers on board during their voyage, and not being more in quantity than is necessary for that purpose, nor to render any vessel liable to forfeiture if really bound from one foreign port to another foreign port, and pursuing such voyage, wind and weather permitting."

Sect. 50 enacts: "That every person, being a subject of Her Majesty, who shall be found or discovered to have been on board any vessel or boat liable to forfeiture under this or any act relating to the customs for being found or discovered to have been within any of the distances in this act mentioned from the United Kingdom or from the *Isle of Man*, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, such goods or things as subject such vessel or boat to forfeiture, or who shall be found or discovered to have been, within any such distances as aforesaid, on board of any vessel or boat from which any part of the cargo or lading of such vessel or boat shall have been thrown overboard, or staved or destroyed, to prevent seizure, and every person, not being a subject of Her Majesty, who shall be found or discovered to have been on board any vessel or boat liable to forfeiture for any of the causes last aforesaid within one league of the coast of the United Kingdom or of the *Isle of Man*, shall, upon being duly convicted of any of the said offences before any two justices of the peace, be adjudged by such justices for the first of such offences to be imprisoned in any house of correction, and there kept to hard labour for any term not less than six nor greater than nine calendar months, and for the second" &c. (prescribing other terms of imprisonment for a second and subsequent offences); "and it shall be lawful for any officer or officers of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer or officers of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, and he and they is and are hereby authorized, empowered, and required to detain every such person, and to take such person before any justice of the peace in the United Kingdom or in the *Isle of Man*, to be dealt with as hereinafter directed:

which such punishment or penalty shall have been inflicted, or the cause of such forfeiture, is set forth in the words of the act or acts by which such punishment or penalty has been inflicted, or under which such forfeiture has been incurred; and that no warrant of commitment for any such offence shall be held void by reason of any defect in such warrant, nor shall any party be entitled to be discharged out of custody on account of any such defect, provided it be alleged in such warrant that the said party has been convicted of such an offence, and provided it shall appear to the Court or Judge before whom such warrant is returned that such conviction proceeded upon good and valid grounds." Here the warrant does shew a conviction under the statute; and the Court will assume that the depositions be-

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Provided always, that any such person proving to the satisfaction of any justice or justices before whom he may be brought that he was only a passenger in such vessel or boat, and had no interest whatever either in the vessel or boat, or in the cargo, or any goods on board the same, shall be forthwith discharged by such justice or justices."

Sect. 58 is as follows. "And whereas it is expedient that time should be allowed to obtain the order of the Commissioners of customs or excise as hereinafter directed, and also to prepare informations, convictions, and warrants of commitment; be it enacted, That when any person or persons shall have been detained by any officer or officers of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or by any officer of customs or excise, or any person or persons acting in his or their aid or assistance, or duly employed for the prevention of smuggling, for any offence against this or any other act or acts relating to the customs, and shall have been taken before any justice of the peace, if it shall appear to such justice that there is reasonable cause to detain such person or persons, such justice may and he is hereby authorized and required to order such person or persons to be detained a reasonable time, and at the expiration of such time to be brought before any two justices of the peace, who are hereby authorized and required finally to hear and determine the matter."

Sect. 103 is sufficiently set forth in the text, p. 674, antè.

fore the justices afforded good ground for the conviction. Had that not been so, the parties disputing the commitment ought to have shewn the want of grounds by bringing up the depositions. [Lord *Denman* C. J. The conviction is upheld by the statute, "provided it shall appear to the Court or Judge before whom such warrant is returned that such conviction proceeded upon good and valid grounds." If there is an objection on the face of the proceedings, does not it rest with those who would maintain them to shew that there were good grounds for the conviction?] If the depositions are material, they can now be produced, with affidavits verifying them. [Lord *Denman* C. J. The proper course would have been to bring them up by certiorari.] The gaoler has not the depositions; and there is no person interested in going to the expense of bringing them up, except the party moving for the habeas corpus. (*The Court* permitted the depositions to be commented upon, provisionally, for the purpose of shewing that the conviction was well grounded.)

The conviction, as recited in the commitment, is not defective. The defendant contends that, as he was convicted, under sect. 50, of having been found on board a vessel liable to forfeiture under sect. 2, it ought to appear that the commitment negatived all the exemptions, given in sect. 4, from the penalties imposed by sect. 2. But sect. 4 is a substantive clause, distinct from that on which the conviction is grounded. In 1 *Burn's Justice*, 972 (*a*), tit. *Conviction*, sect. 1. § 8, after noticing the rule that "a conviction on a penal statute ought expressly to shew that the defendant is

(*a*) 29th (*Chitty & Bere's*) edition.

not within any of its provisoes (*a*)," it is added: "This is to be understood with the following limitation, that where the enacting clause of a statute constitutes an act to be an offence under certain circumstances, and not under others, there, as the act is an offence only sub modo, the particular exceptions must be expressly specified and negatived; but where a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases, or in the same clause, but not in the enacting part of it, by words of reference or otherwise, makes such proviso or exception, there the proviso is a matter of defence or excuse, which need not be noticed in the information." And in *Thibault* v. *Gibson* (*b*) *Parke* B. (after citing note (1) to *Sanders's Case* (*c*)), said: "In all cases of exception, where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it." Besides, the process in this case was in the nature of a proceeding against an accessory. Sect. 2 pronounces forfeiture against the ship, which forfeiture is a sentence in rem: sect. 50 imposes a penalty on the person found on board the ship subject to such liability. In alleging the liability of the ship for the purpose of convicting the party found on board, it cannot be necessary to deny all the circumstances which might have prevented the liability of the ship from attaching. It is, then, sufficient here that the offence is described in the words of the statute, so that, if the proceeding had been by indictment, stat. 7 *G.* 4. *c.* 64. *s.* 21. (*d*) would have cured

(*a*) 4 *Hawk. P. C.* 69. 7th ed. B. 2. c. 25. s. 113.
(*b*) 12 *M. & W.* 88. 95.
(*c*) 1 *Wms. Saund.* 262 *a.*, 6th ed.
(*d*) See *Hamilton* v. *The Queen*, antè, p. 271.

a defect in the description of the offence after verdict. As to the illegality of the detention, that, if justly alleged, might be ground for an action against the magistrates who ordered it, but did not take away the jurisdiction to convict when the information came on for hearing. (The argument on this point went into details, which are omitted as the decision did not turn upon them.)

Lush, contrà. The proceeding in this case cannot be aided by sect. 103. If the depositions could avail, they ought to have been brought up by certiorari. In *Regina* v. *Chaney* (*a*) an imperfect conviction was recited in the warrant; and *Patteson* J. would not notice the conviction itself, because the Crown had not brought it up by certiorari (*b*), and the defendant was precluded from doing so by the statute under which the conviction took place. The conviction here, as recited in the warrant, does not shew an offence over which the magistrates had jurisdiction: and to such an objection it is no answer that a conviction de facto is alleged; *Regina* v. *King* (*c*); even though the words of the act are followed. Sect. 4 of stat. 8 & 9 *Vict. c.* 87., though a separate clause from sect. 2, is not in the nature of a proviso, but is a general enactment over-riding that section, and must be read as incorporated with it and completing the description of the offence thereby created. [Lord *Denman* C. J. referred to *Lawton* v. *Hickman* (*d*) and the cases immediately following.] The justices cannot frame a perfect conviction without excluding every

(*a*) 6 *Dowl. P. C.* 281.

(*b*) See *John Hammond's Case*, antè, p. 99, note (*a*).

(*c*) 1 *Dowl. & L.* 721.

(*d*) Antè, p. 563 to 592. See the arguments in *Eadon* v. *Bransom*, antè, p. 580, and *O'Neil* v. *Brindle*, antè, p. 583.

circumstance the absence of which is necessary to make up the offence. This is the more evident because, in one instance and in no other, the statute gives an exculpation which the party charged is to prove; namely, in the proviso of sect. 50, that a person taken on board the forfeited vessel, and proving to the satisfaction of the justices that he was only a passenger, and had no interest in the goods, shall be discharged. [*Erle* J. The general result of the authorities is that an exception, if made in the clause creating the offence, must be negatived, but not if it be made in a subsequent clause.] That is laid down in *Spieres* v. *Parker* (*a*), and in the passage cited on the other side from *Burn*. But, where the clause creating the offence is so combined with a subsequent one that the latter must be taken to add part of the definition of the offence, the two must be read together, and exceptions in each must be negatived. This Court has now fully decided that, where a statute imposes penalties for an act which is an offence only sub modo, it is not enough to describe such act in the statutory words, but there must be averments shewing it to fall within the conditions prescribed by the statute. In *Fletcher* v. *Calthrop* (*b*) Lord *Denman* C. J. stated, as "the principle of former cases, that, where a certain act is made punishable by summary conviction, which act may be lawful if performed under certain circumstances, these circumstances ought to be negatived in the conviction. None of us doubt," his lordship said, "that, where the proof must negative such circumstances, the allegation in the instrument of conviction ought to do the same." The same principle was acted upon in *Seth Turner's Case* (*c*).

(*a*) 1 *T. R.* 141. 144. (*b*) 6 *Q. B.* 880. 890.
(*c*) Antè, p. 80.

He then proceeded to contend that the illegal detention made the subsequent conviction irregular: on which point he cited *The Attorney General* v. *Dorkings* (*a*).

Cur. adv. vult.

On the next day (*November* 25th),

Lord DENMAN C. J. said: My two learned brothers who heard this case with me are agreed that the prisoner must be remanded. I own I entertain the greatest doubt whether this is a good conviction. It was contended, on behalf of the prisoner, that, although the conviction follows the words of the act, it states no offence; and I feel great doubt whether that is not so. The act which is made the subject of conviction is in its nature one which may be perfectly innocent; and the statute itself contemplates that it may be so under circumstances pointed out in sect. 2 and sect 4. The description of the offence in a conviction should be made complete. I am aware that, in general, where an offence is created by one section of a statute and an exemption given by another, it is held unnecessary to negative the exemption; but it does not follow that, where the act is in itself perfectly indifferent, it is not necessary to state all that gives it the character of an offence. It may have been the intention of the legislature that the mere being on board a vessel found in a particular situation, and having certain articles on board, should be an offence; but I do not see whence any legal or reasonable implication to this effect can be drawn.

(*a*) 11 *Price*, 156.

Summary powers of inflicting penalties should be strictly watched, particularly in revenue cases; and there are provisions in this act which put any one on his guard who has to take it into consideration: such is, for instance, the enactment (*a*) which imposes a penalty on any subject of Her Majesty found or discovered to have been on board any vessel liable to forfeiture for being found or discovered to have been within certain distances from the United Kingdom, having on board "or having had on board" (*b*) certain goods.

I merely state this as my doubt, and wishing to leave the question as much open as it can be, after my learned brothers have delivered their opinion.

Coleridge J. then delivered the judgment of the Court.

This is a commitment under the 50th section of stat. 8 & 9 *Vict. c.* 87.: and the first question is, whether the exceptions to the operation of the act, which are contained in the 4th section, ought to have been negatived. The prisoner is found on board a foreign vessel having tobacco stalks on board; she becomes thereby liable to forfeiture under the 2nd section: the exceptions in question apply to her; they are not referred to by the enacting section; but the section containing them is in the nature of a limitation upon it, declaring that nothing therein contained shall extend to vessels under the circumstances which it goes on to specify.

The general rule respecting the framing of commitments and convictions in this respect is well known, and was not questioned in the argument: and we think no

(*a*) Sect. 50. Sect. 2.

distinction arises to take this case out of its operation from the particular wording of the 4th section. It is, in substance, a distinct and independent clause of exceptions; and therefore it would properly be for the defendant to bring himself within it by way of defence. But, for the defendant, it was argued that the general rule did not apply where the excepting clause did not create personal exemptions, but introduced limitations or modifications into the definition of the offence; that it was essential for the conviction or commitment fully to state all circumstances constituting an offence; and that here no offence was stated, because it could not be contended that, merely for being within a league of our coast with tobacco stalks on board, every foreign vessel was liable to forfeiture. *Seth Turner's Case* (*a*), and the cases there cited, were relied on. But this case is distinguishable. Supposing that there was no such clause in the act as the 4th, it might seem a strong thing for the legislature to have passed such an act, but it could not have been contended *here* that a vessel brought within its terms was not also within its penalty. It is clear, therefore, that primâ facie an offence is stated.

But an observation arises upon the enacting section in this case, which furnishes a strong argument against the defendant: that, in the body of it, several exceptions are in terms introduced which it clearly would be necessary to negative. When we find these thus separated from those included in the 4th section, it seems to follow that it was intended to leave the latter as matter of defence, and that the exclusion of them in the first instance is not necessary to constitute the offence. It is to be remembered, further, that this offence is under the

(*a*) Antè, p. 80.

50th section; and that speaks of a vessel "liable to forfeiture," not generally under this act, but "for any of the causes last aforesaid." Now these are the causes specifically mentioned in the earlier parts of the section, which are complete in themselves, and do not at all include or refer to the modifications or exceptions in the 4th section. No practical hardship is hereby cast on the defendant; he must know better than any one the particular excusing circumstances, if any, under which his vessel or he himself was found within the prohibited distance. Whereas, if the informant were bound to negative one, he must negative all, of the exceptions in the 4th section, and of course offer *some* evidence of the truth of the allegation. This would extend to many circumstances wholly irrelevant, of which, too, none would be likely to be within his cognizance. It appears to us that these circumstances, without having recourse to the 103d section, are sufficient to dispose of this objection, and that this case is clearly distinguishable from those cited in the argument.

The second objection, we think, received a satisfactory answer at the bar. The objection is founded on the notion that the justices had all their power to hear the complaint under the 58th section; that this was a special power, and had not been regularly acted on. We think that clause does not give the jurisdiction, but merely, and perhaps ex abundanti cautelâ, gives a power of detainer for the particular purpose, there mentioned, of obtaining the order of the Commissioners of customs. The jurisdiction of the justices is given to them *as such* under the 50th section. Whether there has been an illegal detainer, or whether the magistrates

properly or improperly remanded the prisoner from the 31st of *August*, is immaterial to this conviction; and upon these questions we say nothing. The justices still had their jurisdiction to hear and determine the offence when they did.

The prisoner therefore must be remanded.

Lord DENMAN C. J. then said that he entertained no doubt on the point of jurisdiction.

ERLE J. added that he concurred in the judgment just delivered by *Coleridge* J., and thought it very important to adhere to the rule, though it was not absolutely universal, that exemptions in a distinct clause need not be negatived.

Prisoner remanded.

TENNANT *against* BELL.

In an action of debt against an overseer, under stat. 17 *G.* 2. *c.* 3. *s.* 3., for not giving to an inhabitant of the township, as directed by *s.* 2., a copy of a rate "forthwith" upon demand and offer of payment, the complaint being that the defendant had used undue delay:

Held, that it was not the Judge's duty to tell the jury, as a direction in point of law on the facts proved, that the copy was or was not given forthwith: but that he was right in leaving it to them to say whether, under the circumstances, it had or had not been given in reasonable time, and therefore, according to reasonable construction, "forthwith."

DEBT on stat. 17 *G.* 2. *c.* 3. *s.* 3. The declaration stated that, whereas, before and at the time of the committing &c., the plaintiff was an inhabitant of the township of *Kirkby Lonsdale*, in *Westmoreland*, of which township there was not at the times hereafter mentioned respectively, or at any other time, any churchwarden or churchwardens or other person or persons authorized to take care of the poor in the said town-

ship, except the overseers of the poor of the said township: And whereas, before and at the time of the committing &c., defendant was one of the overseers of the poor of the said township: And whereas also, before the time of the committing &c., to wit on &c., the greater part of the overseers of the poor of the said township, to wit *W. C.*, *J. G.* and the defendant, then being such greater part as aforesaid, made a rate for the relief of the poor of the said township, which rate was afterwards, and before the committing &c., to wit on &c., duly allowed &c. (stating an allowance by two justices of the county, being of the quorum): And whereas also, on the *Sunday* next after the same rate had been so allowed by the said justices as aforesaid, and after 1st *January* A. D. 1838 (*a*), and before the committing &c., to wit on &c., the said *W. C.*, *J. G.*, and the defendant and one *J. B. G.*, then being the overseers of the poor of the said township, and, as such overseers, then being the persons authorized to take care of the poor in the said township, gave public notice of the said rate so allowed as aforesaid, according to the form of an act &c. (7 *W.* 4. & 1 *Vict. c.* 45. (*b*)); that is to say, by then, on the said *Sunday* next after the said allowance, affixing on the doors of a certain church within the said township, there then being no other church or chapel within the said township, a copy in writing of such notice reduced into writing, namely, by so then affixing the same previously to the commencement of divine service in the

(*a*) Stat. 7 *W.* 4. & 1 *Vict. c.* 45. *s.* 1.

(*b*) Entitled "An Act to alter the mode of giving notices for the holding of vestries" &c., "and of giving notices on *Sundays* with respect to various matters."

said church: And whereas also the plaintiff, then still being such inhabitant as aforesaid, and at a reasonable time and place in that behalf, to wit on &c., demanded of the defendant, as then being such overseer as aforesaid, a copy of the said rate so made and allowed, and whereof notice was so given as aforesaid, and was then ready and willing, and offered to the defendant, to pay defendant for such copy at the rate &c., according to the form of the statute in such case &c.; and although a reasonable time for defendant to give plaintiff a copy of the said rate long elapsed after the making of the said demand and before the commencement of this suit: yet defendant did not nor would, upon the said demand, forthwith give to the plaintiff a copy of the said rate or any part thereof, but wholly neglected so to do, contrary to the form of the statute in such case &c. Whereby &c. (forfeiture by defendant of 20*l.*); and whereby, and by force of the statute in such case &c., an action hath accrued to plaintiff, being the party by the said neglect aggrieved, to demand and have of and from defendant the said sum of 20*l.* &c.

Plea. That defendant does not owe the said sum &c., or any part &c., in manner &c. Issue thereon.

On the trial, before *Wightman* J., at the last Summer assizes for *Westmoreland*, it appeared that the plaintiff demanded of the defendant at his house a copy of the rate on *Friday*, 24th *October*, the rate having been published on the preceding *Sunday*. The plaintiff tendered money for a copy; the defendant said he had not time then to give it, but plaintiff might have it as soon as the overseers had done their work. It appeared that they were busy in collecting the rate. The plaintiff applied again for the copy on *Wednesday* and *Friday* following,

but without seeing the defendant. The copy had not been prepared; and on the last mentioned *Friday*, *October* 30th, the plaintiff sued out a writ in the present action. It did not appear that, at that time, the copy had been begun. To make it would require from eight to ten hours. A copy was offered to the plaintiff on *November* 6th. *Wightman* J. said that he should leave it to the jury to say, on this evidence, whether the defendant had failed to give a copy within a reasonable time for that purpose. *Pashley*, for the plaintiff, urged that the learned Judge ought to state to the jury, as matter of law, whether or not the defendant had omitted to give a copy "forthwith," within the meaning of the statute. But *Wightman* J., in summing up, left to the jury as a question to be answered by them, whether the defendant had neglected forthwith, on demand, to give a copy of the rate; and he observed that a reasonable time must be allowed; that a reasonable construction must be given to the word "forthwith;" that it might not be practicable to set about the copy immediately on the demand; and that the question would be, whether the defendant did it as soon as he well could, so that, under the circumstances, it had been done forthwith. Verdict for defendant.

Pashley, in this term (*November* 6th), moved (*a*) for a new trial on the ground of misdirection. Stat. 17 *G.* 2. *c.* 3. *s.* 2. enacts that the overseers shall permit all the inhabitants to inspect the rate at all seasonable times, paying &c., "and shall, upon demand, forthwith give copies of the same, or any part thereof, to any inhabitant"

(*a*) Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

&c., paying at the rate of 6*d.* for every twenty-four names. In *Tennant* v. *Cranston* (*a*), which was an action on this clause by the present plaintiff against another overseer, *Patteson* J., at the last Spring assizes, treated it as a question to be decided by him, whether, under the circumstances proved, which were like those of the present case, the copy was given forthwith, according to the statute. His Lordship said, after referring to the facts: "Can any one say that this was done 'forthwith?' When the act uses that word, it does not mean after the overseer had done collecting." He added that it was the overseer's duty to set about the copy at once; and, if he delayed for ten or twelve hours, it lay on him to shew a sufficient obstacle. [Lord *Denman* C. J. When the learned Judge asked "can any one say?", he meant, "can the jury say?"] He stated that four days was not "forthwith." [Lord *Denman* C. J. That is, he expected the jury would think so.] In *Regina* v. *Robinson* (*b*) this Court said that "forthwith," in stat. 9 *G.* 4. *c.* 31. *s.* 27., ought to have a reasonable construction; and they decided that the certificate under that clause was not given forthwith. [Lord *Denman* C. J. There it came to a naked question, whether for the purpose of giving the certificate two months were "forthwith." *Coleridge* J. In *Spencely* v. *Robinson* (*c*), which was an action on this statute for refusing inspection and a copy of a rate, *Bayley* J. (at nisi prius) suggested that the refusal proved might be done away with by what subsequently took place; and he said that "a party was bound to give an overseer a reasonable time to do what the law required;"

(*a*) 8 *Q. B.* 707.: but not on this point.
(*b*) 12 *A. & E.* 672. See *Thompson* v. *Gibson*, 8 *M. & W.* 281.
(*c*) 3 *B. & C.* 658.

and, "if they thought that the defendant had complied with the demand in a reasonable time, the defendant was entitled to a verdict." *Abbott* C. J. doubted whether the Judge ought not to have directed a nonsuit: but that was because the facts were so clear. He said, "The question left to the jury was, whether the defendants had, within a reasonable time, complied with the request of the plaintiff to be permitted to inspect the rate;" and the ruling was held right. The objection now stated does not seem to have occurred.] Reasonable time is a question of law: *Com. Dig. Temps* (D); *Co. Litt.* 56 b.; *Willowes' Case* (*a*); 2 *Inst.* 222. (as to reasonableness generally); *Scheibel* v. *Fairbain* (*b*); *Tindal* v. *Brown* (*c*); *Darbishire* v. *Parker* (*d*); *Anderson* v. *The Royal Exchange Assurance Company* (*e*). This doctrine has ever been applied, on prosecutions for murder, to the question, whether or not there had been time for the blood to cool after provocation; 1 *Russ. on Crimes*, 525 (3d ed.); *Rex* v. *Oneby* (*g*), *Rex* v. *Fisher* (*h*). The manner of treating questions of law which connect themselves with matter determinable by the jury is discussed in *Morrell* v. *Frith* (*i*). [*Wightman* J. The reason for granting a new trial is, that the Court is dissatisfied with the finding of the jury. But, if I now say that I think the defendant's compliance was "forthwith," and the Court are of opinion that the jury have done exactly what I ought to have told them to do, what reason is there for interfering?] The plaintiff was entitled to

(*a*) 13 *Rep.* 1. 3.
(*b*) 1 *B. & P.* 388.
(*c*) 1 *T. R.* 167.; 2 *T. R.* 186.
(*d*) 6 *East*, 3.
(*e*) 7 *East*, 38.
(*g*) 2 *Ld. Ray*, 1485. 1494.; *S. C.* 2 *Stra.* 766. 773.
(*h*) 8 *Car. & P.* 182.
(*i*) 3 *M. & W.* 402.

have the Judge's opinion delivered at the trial. [Lord *Denman* C. J. You might have tendered a bill of exceptions.] The legal effect of the word "forthwith" is discussed in *Hyde* v. *Watts* (*a*); and that of "immediately" in *Grace* v. *Clinch* (*b*).

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term (*November* 16th), delivered the judgment of the Court.

A new trial was moved for in this case on the ground of misdirection; the plaintiff having insisted that a copy of the rate was not given "forthwith," and the Judge having treated that as a question for the jury under the circumstances of the case. My brother *Patteson* was cited as having, in a case of *Tennant* v. *Cranston* (*c*), given his view as a direction to the jury in point of law on the subject of reasonable time. We have conferred with my brother *Patteson*; and he says that he did not there lay it down as matter of law that the copy had not been given in reasonable time, but left the question to the jury as one upon which they were to form their opinion according to the circumstances. This was the course taken by my brother *Wightman* in the present case, and by *Bayley* J. in *Spenceley* v. *Robinson* (*d*). We therefore think there is no ground for a rule.

Rule refused.

(*a*) 12 *M. & W.* 254. 261.
(*b*) 4 *Q. B.* 606.
(*c*) See p. 688, antè.
(*d*) 3 *B. & C.* 658.

RACKHAM *against* BLUCK, Clerk.

Thursday, November 19th.

A proceeding in the Consistorial Court to recover penalties for non-residence under stat. 1 & 2 *Vict. c.* 106. *ss.* 32., 114. is not a criminal suit within stat. 3 & 4 *Vict. c.* 86. *s.* 23., but a civil suit, and therefore is not to be instituted in the mode pointed out by sect. 3 of the latter act.

Semble, that an allegation, in such proceeding for penalties, that the party complained against was and is "rector of the rectory and parish church of *W.*" "rightly instituted and inducted" thereto, sufficiently implies that he had a cure of souls. At least an objection to its sufficiency will not be entertained on motion for a prohibition after sentence.

Where a sentence of the Consistorial Court, in such proceeding, condemned the party charged in payment of one third part of the annual value of his benefice, with the reasonable expense of the promoter of the suit; Held, on motion for a prohibition, that such sentence was valid, and consistent with stat. 1 & 2 *Vict. c.* 106. *s.* 10., though it went on to order that the amount of such third part and of such expense should "be ascertained in the usual and accustomed manner by the Registrar" of the Court: it appearing that the sentence was conformable to the practice of the Consistorial Court, and that, by such practice, payment would not be enforced till the Bishop had received the Registrar's report of the amount, and made an order thereon.

SIR *F. KELLY*, Solicitor General, in last *Trinity* term, obtained a rule calling upon *Matthew Rackham*, *Edward*, Lord Bishop of *Norwich*, *Charles Evans*(*a*) and *John Kitson* to shew cause why a prohibition should not issue to the Episcopal Consistorial Court of *Norwich*, the said Bishop, and the Judges of the said Court, to prohibit the said Court from further proceeding in the after mentioned suit. By the affidavit and exhibits on which the rule was moved for, the material facts and documents appeared to be as follows.

Matthew Rackham instituted a proceeding or cause against the Rev. *John Bluck* in the Consistorial Court of *Norwich*, under stat. 1 & 2 *Vict. c.* 106. (*b*), sect. 32 (*c*).

(*a*) *Evans* had succeeded *Yonge* (after mentioned, p. 694.), in *December* 1844, as Vicar General and Official principal to the Bishop; *Kitson* was registrar of the Bishop's Court.

(*b*) "To abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy."

(*c*) Stat. 1 & 2 *Vict. c.* 106. *s.* 32. enacts: "That every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such license or exemption as is in this act allowed for

The act of Court to lead the decree or citation was as follows.

"In the Episcopal Court of *Norwich*.

At *Norwich*, before *Charles Evans*, Esq. Surrogate &c., on the 12th day of *September* 1843.

Present the Notary public subscribing.

☞ A business of shewing cause why the Rev. *John Bluck*, clerk, rector of the rectory and parish church of *Walsoken* in the county of *Norfolk* and diocese of *Norwich*, should not be pronounced to have forfeited one third of the annual value of his said benefice by reason of his having been absent therefrom for a period

On which day *Skipper* appeared for the said *Matthew Rackham*, and exhibited his proxy" &c., "and alleged that the said *John Bluck*, clerk, was the lawful rector of the rectory and parish church of *Walsoken* in the county" &c., "from in or about the month of *January* A.D. 1841, and still is the lawful rector

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that purpose, or unless he shall be resident at some other benefice of which he may be possessed, absent himself from such benefice, or from such house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months and not exceed six months, forfeit one third part of the annual value of the benefice from which he shall so absent himself;" &c.: adding increased penalties for longer absences.

The material parts of sect. 10 are stated in pp. 708, 709, post.

Sect. 114 enacts: "That all penalties and forfeitures which shall be incurred under this act by any spiritual person holding a benefice shall and may be sued for and recovered in the Court of the bishop of the diocese in which such benefice is situate, and by some person duly authorized for that purpose by such bishop by writing under his hand and seal, and in no other Court, and by or at the instance of no other person whatever; and that the payment of every such penalty or forfeiture, together with the reasonable expense incurred in recovering the same, shall and may be enforced by monition or sequestration; and that it shall and may be lawful for such bishop, by any order made for that purpose in writing under his hand, and to be registered in the Registry of the diocese, which the Registrar is hereby required to do, to direct that every such penalty or forfeiture so recovered as aforesaid, and which shall not have been remitted in whole or in part, or so much thereof as shall not have been remitted, shall be applied towards the augmentation or improvement of such benefice or of the house of residence thereof, or of any of the buildings or appurtenances thereof."

exceeding the space of three months, and not exceeding the space of six months, of and in the year ending the 31st day of *December* 1842, without any such license or exemption as is allowed by the statute in that behalf, and without having been resident at some other benefice of which he was possessed; and why the payment of such forfeiture, together with the reasonable expense incurred thereby, should not be enforced by monition and sequestration, pursuant to the said statute.

Promoted by *Matthew Rackham*, of" &c., "gentleman, duly authorized for that purpose under the provision of the statute aforesaid,

against

The said *John Bluck*."

thereof; and that he absented himself from the said rectory for a space exceeding three months" &c., "without any such license" &c., "and without having been resident at some other benefice" &c. (as in the opposite column); and, by reason of such absence contrary to law, he incurred a forfeiture of one third of the annual value of his said benefice. And the said Surrogate, at the petition of *Skipper*, decreed the said *John Bluck* to be cited and called to appear before the worshipful" &c. (going through the form used in the citation itself; see below).

A decree or citation was accordingly issued under the seal of the Consistorial Court, addressed to all clerks &c. in the diocese, whereby, after reciting the decree of the Surrogate above stated, the Bishop commanded that the said Rev. *John Bluck* should be cited to appear personally or by proctor before the Vicar general and Official principal, his Surrogate or some other competent judge &c., in the Cathedral Church of *Norwich* &c., on the 18th *September* then instant, "then and there to shew cause, if he has or knows any, why he the said Rev. *J. B.* should not be pronounced to have forfeited one third of the annual value of his benefice of *Walsoken* aforesaid, by reason of his having been absent therefrom for a period" &c. (as in the first columns of pp. 692, 3, antè, to "monition and sequestration"), "under and pursuant to the provisions of the said statute passed" &c. (1 & 2 *Vict. c.* 106.), "and further to do and receive as unto law

and justice shall appertain, under pain of the law and contempt thereof, at the suit or instance of the said *M. Rackham*, duly authorized for that purpose by us in writing under our hand and seal. And what you shall do" &c. "you shall duly certify our said Vicar general," &c. "Given" &c.

The citation was served; and *Rackham*, on 30th *October*, 1843, exhibited, propounded and filed in the cause an allegation or charge, before the said *Charles Evans*, the Surrogate of *William Yonge*, clerk, Vicar general of the Bishop, and Official principal of the Consistorial Court, as follows.

"In the Episcopal Consistorial Court of *Norwich*.

On *Monday* the 30th day of *October*, A. D. 1843, before you, the worshipful *Charles Evans*, Esq. M.A., *Surrogate*" &c.

"RACKHAM *against* BLUCK.

On which day *Skipper*, in the name, and as the lawful proctor, of *Matthew Rackham*, the party promoting the above cause, and by all better and more effectual means which may be beneficial for his said party, said, alleged, and in law articulately propounded, as follows, to wit:

1. That in and by a certain act of parliament" &c. reciting the enactment of sects. 32 and 114 (down to "monition and sequestration") of stat. 1 & 2 *Vict. c.* 106. "And this was and is true; and the party proponent alleges and propounds of every thing in this and the subsequent articles of this allegation contained, jointly and severally.

"2. That the said Rev. *J. Bluck*, clerk (the party against whom this cause is promoted), is a priest or minister in Holy Orders of the Church of *England*, and for two years and upwards last past hath been and now is rector of the rectory and parish church of *Walsoken* in the county" &c., "whereto he hath been rightly and lawfully instituted and inducted; and that for and as the lawful rector of the said rectory and parish church of *Walsoken* the said Rev. *J. Bluck* hath been for two years and upwards last past, and now is, commonly accounted, reputed and taken." "And this was and is true;" &c.

"3. That the said Rev. *J. Bluck*, being rector of the said rectory and parish church of *Walsoken* as aforesaid, and neither having any such license or exemption from residence upon his said benefice as is allowed in the act of parliament aforesaid, nor being resident upon any other benefice whereof he was possessed, absented himself from and did not keep residence at his said benefice of *Walsoken* for a period exceeding

three months and not exceeding six months of and in the year beginning and ending respectively the 1st day of *January* and the 31st day of *December* 1842, to wit from on or about the 29th day of *August* to the said 31st day of *December* of the said year; and that he hath thereby, under the provisions of the aforesaid act of parliament hereinbefore set forth or mentioned, forfeited one third part of the annual value of his said benefice of *Walsoken*. And this" &c.

4. Estimating the net annual value of the said benefice, for the purposes of the act, at "the sum of 1300*l.* or 1200*l.*, or at least 1100*l.* And this" &c.

"5. That the Right Reverend" &c. "*Edward*" &c., "Lord Bishop of *Norwich*, hath, in and by a writing under his hand and seal, duly authorized and empowered the said *M. Rackham* to sue for and recover all penalties and forfeitures incurred by the said Rev. *J. Bluck* under or in pursuance of the provisions of the act of parliament aforesaid. And that" &c.: reference to the said writing, as filed in the registry of the Court. "And this" &c.

"6. That of and concerning the premises it hath been and is on the part and behalf of the said *Matthew Rackham* rightly and duly complained to you the Surrogate" &c.

7. That all and singular the premises were and are true" &c. "Of which legal proof being made, the party proponent prays that right and justice may be effectually done and administered to him and his said party in the premises, and that the said Rev. *J. Bluck* may be pronounced to have forfeited one third part of the annual value of his benefice of *Walsoken* aforesaid, and be condemned in the payment thereof and of the reasonable expense incurred in the recovery of the same in this cause and otherwise, and compelled to the due payment thereof by your definitive sentence or final decree to be given and made in this behalf, and that the same may be enforced, if need be, by monition or sequestration; the party proponent not obliging himself to prove all" &c.; "and prays that, so far as he shall prove" &c., "so far he may obtain" &c.

A decree then issued, authorizing citation of the Rev. *J. Bluck* to appear and give in his personal answers upon oath, and further to do and receive &c. Citation was served accordingly.

The proctor for the Rev. *J. Bluck* appeared "in the cause and proceedings, and objected, on behalf of the said *J. Bluck*, to the sufficiency thereof, and to the jurisdiction of the said Court, and to the reception of the said allegation or charge." But the Surrogate

received the same, entertained the cause and proceedings, and, on *July* 1st 1844, gave sentence therein as follows.

The sentence, by *Charles Evans* Esq., M.A., Surrogate of *William Yonge*, clerk, M.A., Vicar general &c. of the Bishop, and Official principal &c. &c., set forth that

"We" &c., "having heard, seen and understood" &c. "the merits and circumstances of a certain cause or business now depending before us in judgment promoted and brought by *Matthew Rackham*, of" &c., "against the Rev. *John Bluck*, clerk, rector of" &c., "of shewing cause, if he has or knows any, why he the said Rev. *J. B.* should not be pronounced" (stating the subject matter as in pp. 692, 3., antè, first column, down to "said statute): in which cause, the said *M. R.* and the said Rev. *J. Bluck* having lawfully appeared before us in judgment by their proctors respectively, and the said proctor of the said *M. R.* having prayed sentence to be given for, and justice to be done to, his party, and that the said Rev. *J. Bluck* may be pronounced to have forfeited" one third part &c. (as in article 7, p. 695., antè, to "monition and sequestration"): "and the proctor of the said Rev. *J. Bluck* also having prayed sentence" &c.: "and we, having observed all and singular the matters" &c., "have thought fit, and do thus think fit, to proceed to the giving our definitive sentence or final decree in this cause in manner following, to wit:

Forasmuch as, by the acts enacted, deduced, alleged, exhibited, propounded, proved and confessed in this cause, We have found, and it doth evidently appear to us, that the proctor of the said *M. Rackham* hath sufficiently proved his intention deduced in a certain allegation given in and admitted on his part and behalf in the said cause, and now remaining in the registry of this Court" (which allegation was to be taken as if here inserted &c.), "and that nothing, at least nothing effectual in law, hath, on the part and behalf of the said Rev. *J. Bluck*, been excepted, deduced, alleged," &c., "which may or ought in any wise to defeat, prejudice or weaken the intention" &c. "Wherefore we, the worshipful *Charles Evans*" &c., "Surrogate" &c., "having heard the proctors of the said parties in this behalf, do pronounce, decree and declare that the said Rev. *J. Bluck*, being a priest or minister in Holy Orders of the Church of *England*, for two years and upwards last past hath been, and now is, rector of the rectory and parish church of *Walsoken* aforesaid, and hath been thereto rightly and lawfully instituted and inducted: And we also pronounce, decree and declare that, according to the lawful proofs made before us in this cause as aforesaid, the said Rev. *J. Bluck*, neither having, as appears, any such license or exemption from residence upon his said benefice as is allowed in the act of parliament aforesaid, nor being resident, as appears, upon any other benefice whereof he was possessed, did

absent himself from his said benefice of *Walsoken* for a period exceeding three months and not exceeding six months of and in the year beginning and ending" &c., "to wit from on or about" &c. (as in art. 3, pp. 694, 5, antè) "of the said year. Wherefore, and by reason of the premises, we decree and declare that the said Rev. *J. Bluck* ought to be pronounced to have forfeited one third part of the annual value of his benefice of *Walsoken* aforesaid; and we do by these presents so pronounce accordingly. And we do by these presents condemn him, the said Rev. *J. Bluck*, in the payment of such third part of the annual value of his benefice of *Walsoken* aforesaid, together with the reasonable expense incurred by or on behalf of the said *M. Rackham* in the recovery of the same in this cause, the amount of such third part of the annual value of his said benefice of *Walsoken*, and of such reasonable expense, to be ascertained in the usual and accustomed manner by the registrar of our said Court. And we do compel him, the said Rev. *J. Bluck*, to the due payment of the said amount, so ascertained, of such third part and expenses, by this our definitive sentence or final decree, which we give and promulge by these presents, this 1st day of *July* A.D. 1844.

"*Charles Evans*, Surrogate."

The affidavit then stated that, on appeal to the Arches Court of *Canterbury*, the above sentence was affirmed with costs, and the cause remitted (*a*). Appeal was then made to the Queen in Council: and the Judicial Committee of the Privy Council, on *May* 15th, 1846, delivered their opinion (*b*) against the appeal, and that the cause should be remitted, and the appellant condemned in costs.

It was further deposed by a proctor, on behalf of the Rev. *J. Bluck*, that deponent believed it was the intention of the Judicial Committee to report, or that they had already reported, to Her Majesty their said judgment or opinion accordingly, but that the same had not yet been officially confirmed by order of Her Majesty in Council: "That the next Court to be held at the said Consistorial Court at *Norwich* will be on the 15th day of *June* instant:

(*a*) *Bluck* v. *Rackham*, 1 *Rob. Ecc. Rep.* 367.

(*b*) *Bluck* v. *Rackham*, 5 *Moore's Priv. Co. Ca.* 305.

and this deponent verily believes it is intended to proceed with the said cause or proceeding in the said Consistorial Court as soon as the said report of the said Judicial Committee shall have been confirmed, or at the Court next following such confirmation." Another proctor deposed: "That he, deponent, verily believes that the said Registrar" (*John Kitson*) "of the said Court of the said Bishop will proceed to ascertain the amount of the third part of the annual value of the said benefice, and that the said Bishop and Vicar general, or his Surrogate, will proceed to enforce the said sentence and the finding of the said registrar as aforesaid."

Sir *John Jervis*, Attorney General, and *Couch* now shewed cause (*a*). The first alleged ground for a prohibition is, that the proceeding for a penalty under stat. 1 & 2 *Vict. c.* 106., sects. 32 and 114, is a "criminal suit or proceeding" within stat. 3 & 4 *Vict. c.* 86. *s.* 23., and therefore could not lawfully be instituted otherwise than in the mode pointed out by sect. 3 of the same statute (*b*). But, before the first mentioned act,

(*a*) Before Lord *Denman* C. J, *Coleridge*, *Wightman* and *Erle* Js.

(*b*) Stat. 3 & 4 *Vict. c.* 86., "for better enforcing church discipline," enacts,

Sect. 3. "And be it enacted, That in every case of any clerk in Holy Orders of the United Church of *England* and *Ireland* who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report." The mode of procedure is regulated by the next following clauses.

the penalties for non-residence were, by stat. 57 *G.* 3. *c.* 99. *s.* 5., "to be recovered by action of debt:" and no intention is shewn in stat. 1 & 2 *Vict. c.* 106. to change the nature of the proceedings from civil to criminal. Sect. 114 speaks of penalties and forfeitures under that act being "recovered" by some person duly authorized as is there stated. Sect. 115 provides for the recovery of taxed costs, as in a civil suit. And sect. 117 enacts, in the case of penalties under this act incurred by persons not spiritual, or by spiritual persons not holding benefices, that they "shall be sued for and recovered by any person who will sue for the same by action of debt in any of Her Majesty's courts of record at *Westminster*." Debt for penalties is a civil suit; *Wilson* v. *Rastall* (*a*). The penalty, in a criminal proceeding, is not "recovered" by an individual. Lord *Stowell*, in *Turner* v. *Meyers* (*b*), drew the distinction that "the criminal suit is open to every one, the civil suit to every one shewing an interest." Here the proceeding is not open to every one, but only to those who derive an interest from the Bishop's written authority. A criminal proceeding, within the intention of stat. 3 & 4 *Vict. c.* 86., would be by articles exhibited on the promotion of the Judge for reformation of manners; and the object would be sequestration or deprivation, as a punishment. The award of a sum of money, to be enforced by monition and sequestration, is a civil,

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Sect. 23 enacts: "That no criminal suit or proceeding against a clerk in Holy Orders of the United Church of *England* and *Ireland* for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is herein before enacted or provided."

(*a*) 4 *T. R.* 753. 758. (*b*) 1 *Hag. Consist. Rep.* 414, note.

not a criminal, adjudication: sequestration (as appears by the description of that process in 3 *Burn's Ecc. L.* tit. *Sequestration*) is in the nature of a civil execution (*a*). The "laws ecclesiastical" mentioned in sect. 3 of this last statute are the laws of the Church; not the statute law substituted for stat. 57 *G.* 3. *c.* 99. Non-residence may still be punished as an offence by the canon law; for the observation of *Gibson* (2 *Gibs. Cod.* 887, note *q*, 2d ed.) upon the non-residence clause of stat. 21 *H.* 8. *c.* 13. *s.* 26., where a penalty of 10*l.* is given, one half to the King, the other to any party suing by writ of debt &c., continues applicable. "This," he says, "is a coercion upon incumbents, which may be used by any person or persons whatsoever; and doth not supersede or affect the right that the Ordinary hath, by the laws of the Church, to punish non-residence by ecclesiastical censures; which (in case of obstinacy on the part of the incumbent) may be carried to deprivation." The remedies are cumulative, and wholly different. The penalties imposed by sect. 117 of stat. 1 & 2 *Vict.* *c.* 106. upon persons not spiritual, or not holding benefices, are expressly made recoverable by action of debt: and it cannot have been contemplated that the procedure should be criminal in the case of a beneficed person, and civil in the case of one not beneficed. Dr. *Lushington*, delivering the judgment of the Judicial Committee in *Bluck* v. *Rackham* (*b*), said, after citing the enactment of stat. 1 & 2 *Vict.* *c.* 106. *s.* 114. (down to "no other person whatever"): "Now do these

(*a*) *Erle* J. asked, if costs were incident to a criminal proceeding in the Ecclesiastical Courts. Sir *F. Thesiger* cited *Burgess* v. *Burgess*, 1 *Consist. Ca.* 384. 393.

(*b*) 5 *Moore's Priv. Co. Ca.* 305. 313

words import a proceeding in the criminal form or in the civil? The words 'suing and recovering' are wholly inapplicable to the well-known criminal form; had it been intended to require the criminal form, surely the expressions would have been wholly different: power would have been given to promote the office of the judge, and power to the judge to affix the penalty. Not only does not this section contain any words importing that the criminal form should be adopted, but the whole practice of the Ecclesiastical Courts has been to the contrary. There is no instance that their Lordships have been apprised of, in which penalties have been sued for in the criminal form, or any pecuniary forfeiture decreed. On the other hand, though, from the limited jurisdiction of these Courts, there cannot be many classes of cases, yet we find the proceedings to recover tithes under the statute, 2 & 3 of *Edward* 6., where double the value in addition is given by way of penalty, to be recovered before the Ecclesiastical Judge, have always been in the civil form." It is true that the object contemplated in giving the penalty is to punish an offence: but, if the proceedings were therefore criminal, so also would be the suit for double value of tithes under stat. 2 & 3 *Ed.* 6. *c.* 13. *s.* 2., when they have been improperly removed or a view of them prevented; yet the contrary is notorious. *Blackstone*, 4 *Comm.* 308., speaking of informations on statutes which give penalties to the informer, says that they are "a sort of qui tam actions," "only carried on by a criminal instead of a civil process;" thus recognizing the applicability of both modes to the same object. [*Wightman* J. It

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seems that, under the usury laws, there might be either an indictment or an action (*a*)].

Secondly, it is contended that the words "the Rev. *J. Bluck*" "hath been and now is rector of the rectory and parish church of *Walsoken*," "whereto he hath been rightly and lawfully instituted and inducted," do not sufficiently shew that he held and absented himself from a benefice with cure of souls. But that point is now raised for the first time; and the objection comes too late. It was for the Judge of the Ecclesiastical Court to determine whether the allegation was sufficient; and he has decided. The language in a civil proceeding need not be so precise as in a criminal. And the expressions here do imply that the rectory was a cure of souls; unless it be necessary that those very words should be used; which the enactments of stat. 1 & 2 *Vict. c.* 106. on this subject nowhere prescribe. [*Coleridge* J. I believe there are sinecure rectories.] It will not be assumed, without any suggested reason, that this may have been one.

Thirdly, it is contended that the Ecclesiastical Judge ought not to have left it to the Registrar of the Court to ascertain the third part of the annual value, and the costs payable to *Rackham;* for that the sentence of the Court was final, and the Judge ought not, in dismissing the case, to have left any thing to be performed afterwards by another authority. But it is the constant practice of this Court and of the Quarter Sessions to direct that their officer shall ascertain the amount for their information; and the awarding of that amount is deemed the act of the Court. At any rate this is mere matter

(*a*) See 1 *Russ. on Crimes*, 460. B. 2. c. 37. 3d ed.

of practice; and "the temporal courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court;" *Ex parte Smyth* (*a*).

It may be a question whether the decree of the Ecclesiastical Court can be made the subject of a prohibition, after the sentence has been confirmed by the Privy Council on appeal. [*Wightman* J. The prohibition is to stay execution of the judgment. The appeal confirms the judgment; but it still remains to be executed.] The principal questions now raised are precisely those which were before the Privy Council. The attempt is, in effect, to make this Court a court of appeal from the Judicial Committee. A prohibition might have been moved for when the case was before the Court of Arches.

Sir *F. Thesiger* and *Bramwell*, contrà. First. It is certainly more difficult, since the judgment of the Judicial Committee delivered by Dr. *Lushington* in *Bluck* v. *Rackham* (*b*), to contend that the proceeding now in question is of a criminal nature. But no common law Judge was present at that appeal. And the reasoning on which the judgment proceeds is not wholly satisfactory. It takes, as proof that the suit is civil, the fact that civil

(*a*) 3 *A. & E.* 719. 724. (*b*) 5 *Moore, P. C. Ca.* 305.

forms have been adopted (*a*); whereas the whole question is whether the adoption of them in this suit was right. If this was, within stat. 3 & 4 *Vict. c.* 86. *s.* 23., a "criminal suit or proceeding" "for any offence against the laws ecclesiastical," it clearly ought not to have been prosecuted otherwise than under sects. 3 and 7 of the same act; that is, on articles exhibited after enquiry by a commission. Sect. 19 qualifies sect. 3, but strengthens the conclusion just stated: for the enactment, that any person shall still be at liberty to prosecute, as heretofore, any suit which, though in form criminal, shall have the effect of asserting any civil right, implies that, without such enactment, even these suits would have been barred by sect. 3. The proceeding for penalties in case of non-residence is clearly not a suit of this latter kind: and non-residence is an offence against the laws ecclesiastical within sects. 3 and 23. Under the canon law it was a ground for ecclesiastical censure, sequestration and deprivation. In addition to these punishments, the statutes 21 *H.* 8. *c.* 13. *s.* 26., 43 *G.* 3. *c.* 84. *s.* 12. and 57 *G.* 3. *c.* 99. *s.* 5. imposed penalties recoverable by action at law. But then, by stat. 1 & 2 *Vict. c.* 106. *s.* 114. (which repealed the enactments then existing on the subject), a suit in the Bishop's Court was substituted for this proceeding, and is now the only course by which the forfeitures and penalties incurred by non-residence are to be enforced against spiritual persons. The civil character of the proceeding is taken away; and the prescribed suit is the mode of punishment thenceforward appointed for the ecclesiastical offence. On sect. 32, if it had stood

(*a*) He read pp. 311, 312. from "A criminal suit" to "civil form."

alone, and even had gone no farther than to prohibit non-residence, an indictment would have lain. "If by one clause a statute prohibits a thing, and by another clause gives a penalty; an information lies, upon the prohibitory clause:" *Com. Dig. Information* (B). And an enactment giving a particular mode of enforcing the penalty does not render that less a criminal offence which, without such enactment, would have been the subject of an indictment or information. A sequestration of the whole profits of the benefice would without difficulty be recognised as a criminal punishment: a forfeiture of part, under the process given by sect. 114, differs from a sequestration only in degree. The difference between civil and criminal procedure in cases of forfeiture under this statute is marked by sect. 117, which enacts "that all penalties and forfeitures under this act incurred by persons not spiritual, or by spiritual persons not holding benefices, shall be sued for and recovered by any person who will sue for the same by action of debt in any of Her Majesty's Courts of Record at *Westminster*." There the power is reserved to individuals of suing for their own benefit as plaintiffs in the courts of law. But, under sect. 114, the party suing is the statutable promoter of the office of Judge: and he does not prosecute for his own benefit; for the bishop is authorized to appropriate a part or the whole of the penalty to the augmentation or improvement of the benefice. Again, stat. 3 & 4 *Vict. c.* 86. *s.* 19. (already referred to) enacts that nothing in that statute before contained shall prevent any person from instituting &c., or from prosecuting in such form and manner as he might have done before the act, "any suit which, though in form criminal,

shall have the effect of asserting, ascertaining, or establishing any civil right." This distinction is illustrated by cases frequently occurring in the Ecclesiastical Courts. One class of suits, in their form criminal, consists of those which are instituted against the person pro salute animæ, and for the mere purpose of reformation and suppression of scandal, as cases of incest (*Burgess* v. *Burgess* (*a*), *Blackmore* v. *Brider* (*b*), *Chick* v. *Ramsdale* (*c*)), where it is clear, from the subject matter, the proceedings and the nature of the sentence (which usually includes penance), that the suit is criminal. In other suits which have a criminal form the question is essentially on a civil right; and these are distinguished by the rule which the Ecclesiastical Courts have laid down, that the promoter must have an interest of his own, beyond any public concern which may exist in the subject matter. Among the instances of this class are *Ray* v. *Sherwood* (*d*) and *The Duke of Portland* v. *Bingham* (*e*), in which latter case Sir *William Scott* argues at length upon the distinction. But in suits for non-residence, under stat. 1 & 2 *Vict. c.* 106. sects. 32, 114, the party suing need not shew any personal interest: he proceeds, on the public account, to enforce a fine. It has been suggested that sect. 32 is cumulative, and adds a civil remedy to the punishment imposed by the ecclesiastical law. But, under that law, the whole profits of the living might have been sequestered for the same offence; and it cannot be supposed that, where that might have been the case, forfeiture of part would be imposed as an additional

(*a*) 1 *Hag. Consist. Ca.* 384.
(*b*) 2 *Phillim. Rep.* 359.
(*c*) 1 *Curt. Ecc. Rep.* 34.
(*d*) 1 *Curt. Ecc. Rep.* 173.
(*e*) 1 *Hag. Consist. Ca.* 157.

penalty. [*Erle* J. Is there any other instance of a case, deemed criminal under the ecclesiastical law, where the party accused, on paying a sum of money, may claim exemption from all further punishment, pro salute animæ or otherwise?] The case, in that respect, only resembles any other criminal case in which the penalty imposed by law is a fine. The recovery, by sect. 114, is to be by monition and sequestration; but that does not necessarily give a civil character to the offence, more than the statutory levy by distress in cases of summary conviction before justices. *Blackstone*, in the passage referred to on the other side (4 *Comm.* 308), seems to consider all the proceedings by informers to recover penalties as criminal, though some are in form civil: and they appear to be so ranked together in *Com. Dig. Action upon Statute* (E 1.).

Secondly, by the interpretation clause (sect. 124) of stat 1 & 2 *Vict. c.* 106., "in all cases where the term 'benefice' is used in this act, the said term shall be understood and taken to mean benefice with cure of souls, and no other, (unless it shall otherwise appear from the context)." Therefore "benefice" in sect. 32 has that meaning: and it ought to have been shewn on these proceedings that the benefice in question had cure of souls. That does not appear. The allegation that *Bluck* was "lawfully instituted and inducted" does not supply the defect; for "possession of sinecures (not being exempt" &c.) "must be obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely, by presentation, institution, and induction;" 3 *Burn's Ecc. L.* 650, tit. *Sinecure*. 9th ed. It is true that, in *Cathcart* v. *Hardy* (*a*), which

(*a*) 2 *M. & S.* 534.

was an action for penalties incurred by non-residence, it was held unnecessary to allege that the rectory was a benefice with cure of souls: but that was under stat. 43 *G.* 3. *c.* 84., which (sect. 12) imposed the penalty for non-residence on any "benefice" generally: but there the exemption in the case of a parsonage having no cure of souls was given in a distinct proviso, and for that reason it was held that the excuse ought to have been alleged by the defendant, not negatived by the plaintiff. Here, by sect. 124, the words "with cure of souls" are virtually incorporated with the word "benefice" in sect. 32.

Thirdly, the sentence is imperfect, inasmuch as it adjudges that the Rev. *J. Bluck* has forfeited "one third part of the annual value of his benefice of *Walsoken*," condemns him in payment of such third part, with the reasonable expense incurred by the promoter, and orders "the amount of such third part" "and of such reasonable expense, to be ascertained in the usual and accustomed manner by the registrar." By stat. 1 & 2 *Vict.* *c.* 106., sect. 10, the value, for the present purpose, is "the net annual value:" and that, according to sect. 8, is to be ascertained by deducting from the gross yearly income the taxes, rates, &c., and other permanent charges; and for the purpose of such estimate sect. 10 renders it "lawful for the Court before whom any suit shall be depending for the recovery of any penalty or forfeiture under this act, and for any bishop acting under any of the provisions of this act, to make or cause to be made such inquiries and call for such evidence as such Court or bishop shall think fit, and otherwise to proceed upon the best information which such Court or bishop may be able to procure

for estimating in manner aforesaid the annual value of any benefice." That estimate, and the calculation of expenses, must be the act of the Court itself: *Sellwood* v. *Mount* (*a*) and *Regina* v. *Long* (*b*) shew this. It might have been referred to the registrar to ascertain the amounts; but the decree should have been suspended in the meantime, and his estimate, when made, incorporated in it. By sect. 10 the decision of the Court or bishop, "founded on such evidence or other information, shall be final and conclusive, save when appealed from in due course of law." But the appeal is shut out, if the decree be finally pronounced before the estimate is made by the registrar. No appeal is given against his finding. The words "in the usual and accustomed manner" can have no effect; for under a new statute there can be no established usage or custom. This is not a matter of practice, but a question whether the Judge of the Court has not assumed to make a final decree, leaving it incomplete in the most important respects.

The prohibition is not moved for too late. The decree still remains unaccomplished; and the object is to prevent execution: till that is complete, this Court may prohibit; *In the Matter of the Dean of York* (*c*). Whether a prohibition might or might not issue to the Judicial Committee, it is unnecessary to inquire: though the Court of Exchequer seems to have been of opinion, in *Ex parte Smyth* (*d*), that it might.

Cur. adv. vult.

Lord DENMAN C. J., in the ensuing vacation (*December* 17th), delivered the judgment of the Court.

(*a*) 1 *Q. B.* 726. 735. (*b*) 1 *Q. B.* 740.
(*c*) 2 *Q. B.* 1. 39.
(*d*) 2 *Cro. M. & R.* 748.; *S. C. Tyr. & G.* 222

This was a suit in the Consistory Court of the Bishop of *Norwich*, to recover one-third of the profits of a benefice, claimed from Mr. *Bluck* on account of his non-residence thereon. The sentence was against him in that Court; and that sentence was confirmed on appeal in the Arches Court and in the Privy Council.

The defendant now moves for a prohibition on three grounds. 1. That this was a criminal proceeding within stat. 3 & 4 *Vict. c.* 86. *s.* 23.; and that the conditions precedent for a criminal proceeding according to that statute were not fulfilled. 2. That it did not sufficiently appear that Mr. *Bluck* held a benefice with cure of souls. 3. That the definitive sentence was illegal, because the bishop deputed the registrar to ascertain the amount of one-third of the annual value of the benefice, whereas he ought to have adjudicated thereon himself.

As to the first ground. It appears that there are two kinds of proceeding in the Ecclesiastical Courts, civil and criminal; the one by a party interested, in form by libel, where the judgment is for his benefit and is enforced by monition and sequestration; this is a civil suit. The other is by any stranger, in form by promoting the office of judge by articles, and the judgment is for penal consequences against the defendant pro salute animæ and deprivation; this is a criminal suit. And the suit in question is, according to these tests, civil and not criminal. It is instituted, not by any stranger, but by a party who may be said to have an interest, viz. by the nominee of the bishop, who is to recover money, which the bishop may by special order direct to be laid out for the improvement of the benefice, the residence house or buildings (sect. 114), and who

is, in effect, a trustee for this purpose. The proper mode of proceeding is decided, by the tribunals who are to decide on questions of procedure, to be by monition and libel instead of citation and articles; and the decree is for a given amount of value, to be enforced by monition and sequestration only, and not for any penal consequences to be enforced by censure and deprivation. The course of legislation against non-residence indicates that it is a civil proceeding; the penalties given by stats. 21 *H.* 8. *c.* 13., 57 *G.* 3. *c.* 99., and 1 & 2 *Vict. c.* 106. *s.* 117. as against unbeneficed clerks, are all recoverable by civil proceeding in the courts of law. The action of debt for a penalty against a beneficed clerk is taken away; and this proceeding in the ecclesiastical courts is substituted, by stat. 1 & 2 *Vict. c.* 106. *s.* 114., because ecclesiastical profits were to be taken and applied to ecclesiastical purposes, and a temporal Court is not adapted for such a purpose: but though the tribunal is altered, the nature of the proceeding is the same. The condition required by stat. 3 & 4 *Vict. c.* 86. for a criminal proceeding against a clerk in holy orders would be superfluous in respect of a charge of non-residence, as that is specific in its nature and capable of easy ascertainment by the bishop without the aid of a commission to enquire.

Secondly. It is contended that the allegation that Mr. *Bluck* "is rector of the rectory and parish church of *Walsoken*," being "rightly and lawfully instituted and inducted" thereto, does not shew him to have cure of souls. It is difficult so to construe those words as not to include a cure of souls; but the objection has been considered in the appropriate tribunal for putting a construction on this form of pleading, and has been there

overruled on the ground that the words in question did allege a cure of souls; and certainly, in this stage of the proceedings, we ought not to issue our prohibition upon the footing of an objection merely in the nature of a special demurrer.

Thirdly. It is contended that the definitive sentence is illegal in deputing the registrar to ascertain the value, instead of the bishop ascertaining it himself and stating it in his sentence. But it has been answered in the Privy Council that, according to the practice of the Consistory Court, the registrar, under this sentence, would inquire and report to the Bishop, and that the amount so ascertained by him would not be taken without the order of the Bishop. The form of the decree directing the amount to be ascertained "in the usual and accustomed manner" is consistent with this practice. And the affidavit on which the motion is founded prays a prohibition lest the registrar should proceed to inquire and report to the Bishop, and lest the Bishop should proceed to enforce payment. The objection fails, both because it is founded on a mistake of facts, and because it relates to a rule of practice.

The rule, therefore, must be discharged, and, having been obtained after sentence in the Court below and the appellate courts, with costs.

Rule discharged.

TAYLOR *against* CLAY and Another.

Friday, November 20th.

By charter-party, the freighters of a ship agreed with the owners that the ship, being fit for the voyage, should proceed to *Port T.*, and *there load a cargo; the ship to be loaded in turn;* certain working days to be allowed, and a further number of days for demurrage &c.

ASSUMPSIT. The declaration stated that, by a charter-party of affreightment between plaintiff, therein described as owner of the ship *Jane*, then in the *Thames*, and defendants, therein described as of the city of *London*, merchants, it was mutually agreed that the ship, being tight, staunch and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to *Port Talbot* in ballast from the river *Thames*, or so near thereto as she could

The owners brought assumpsit on this agreement, alleging: 1. That, although the ship, being fit &c., sailed, and arrived at *Port T.*, yet defendants did not, within a reasonable time after her arrival there, load a cargo &c.; 2. That defendants did not, at *Port T.*, load the ship in turn, but long after the proper and regular turn; whereby plaintiff was injured &c.

Pleas. 1. That defendants did, *within a reasonable time* after the arrival &c., *load* the ship, &c. 2. That defendants did, at *Port T.*, *load the ship in turn.* 3. That plaintiff was master, and *had the care, direction and management* of the ship; and that, after the ship's arrival at *Port T.*, and before defendants could load &c., plaintiff, so being master &c., and the crew, took such bad care of the ship, and governed and navigated her so improperly, that the ship, by the carelessness, unskilfulness and mismanagement of the said master and crew, became damaged and unfit to receive a cargo, and so remained for a long time &c., by reason whereof defendants could not load &c. Replication, De injuriâ. Issues joined on all the pleas.

By a local act, regulating the port, the master of every ship coming in was bound, under a penalty, to moor, anchor and place the same in such situation as the harbour-master should direct; and the harbour-master was authorized to cause the vessel to be removed in such manner as he should deem necessary. The ship's master was also bound to take on board a pilot, who, by the by-laws of the port, was to obey the orders of the harbour master. It was proved, on the trial, that defendant's ship, with a pilot, arrived at the port, and received directions from the harbour-master as to entering; but the master and crew worked the ship in a manner contrary to his directions; and in consequence she received injury, lost her then turn of loading, and was unable to load till the expiration of some days, when she loaded without further delay. After verdict for defendants on all the issues,

Held, on motion for new trial, that, on the third issue, the Judge rightly directed the jury to find for plaintiffs if they thought the accident was the fault of the master and crew, for: 1. The ship, though under the harbour-master's direction, was, for the purposes of this plea, under the care and management of the plaintiff. 2. The defendants might allege the delay, occasioned as above, in order to shew that they loaded in reasonable time, and in turn, within the meaning of the charter-party.

Held also, on motion to enter a verdict for plaintiff on the 1st and 2nd issues, that, on the facts above stated, defendants were right in pleading that they loaded in turn, and in reasonable time; and that they could not have pleaded in confession and avoidance.

safely get, and there load from the factors of the said affreighters a full and complete cargo of coals, or coal and coke, at shipper's option: cargo to be brought alongside and taken from alongside at shipper's risk and expense; not exceeding what she could reasonably stow &c.: and, being so loaded, should forthwith proceed to *America* &c. (specifying the voyage), and deliver the same on being paid freight &c. (particulars as to freight, commission &c.); the act of God, the Queen's enemies, fire and all and every other dangers &c. of the seas &c., during the voyage always excepted: the freight to be paid on unloading and right delivery of the cargo, in cash &c.: to be loaded in turn; and twenty working days were to be allowed the said merchant, if the ship were not sooner dispatched, for unloading the ship as above, and ten days' demurrage over and above the said laying days, at 3*l.* per day penalty for non-performance of the agreement. The count then averred mutual promises of performance, and that the ship, within a reasonable time after the making of the charter-party, to wit on &c., was tight, staunch and strong, and every way fitted for the voyage in the said charter-party mentioned; and that, although the said ship, so being tight, &c., did with all convenient speed sail and proceed to *Port Talbot* aforesaid in ballast from the river *Thames* aforesaid, and did afterwards, to wit on &c., arrive at *Port Talbot* aforesaid, whereof defendants then had notice, and although plaintiff hath always &c. (the usual averment of performance by plaintiff), nevertheless defendants, not regarding &c., did not nor would, within a reasonable time after the arrival of the said ship at *Port Talbot* aforesaid, there load from their said factors a full or complete cargo of coals, or coal

and coke, at their option, but, on the contrary thereof, did not load the said ship until after the expiration of an unreasonable time, viz. two months, after the arrival of the said ship: And that defendants did not nor would at *Port Talbot* aforesaid load the said ship in turn according to the terms of the said charter-party, but, on the contrary thereof, loaded the said ship long after the proper and regular turn in that behalf: by means of which several premises plaintiff for a long time, to wit &c., lost and was deprived of the use of the said ship &c.

Pleas. 1. As to the first breach: That defendants did, within a reasonable time after the arrival of the ship at *Port Talbot*, load from the said factors a full and complete cargo, according to the said charter-party: conclusion to the country. Issue thereon.

2. As to the second breach: That defendants did, at *Port Talbot* aforesaid, load the said ship in turn according to the terms of the said charter-party: conclusion to the country. Issue thereon.

3. That, during the said voyage in the declaration mentioned, plaintiff was the master of the said ship, and then had the care, direction and management of the same. And that, during the said voyage, and after the arrival of the said ship at *Port Talbot* aforesaid, to wit on &c., and before defendants could load any cargo therein, or any part thereof, according to the terms of the said charter-party, plaintiff, so then being such master, and the said crew of the said ship, the said master and crew then having such care and management as aforesaid, took so little and such bad care of the said ship, and governed and navigated the same in so unskilful and improper a manner, that the same, by and through the carelessness, unskilfulness, misdirection, mismanage-

ment and improper conduct of the said master and crew in that behalf, then, to wit on &c., became greatly broken, damaged &c., and rendered wholly unfit to receive any cargo therein according to the terms of the said charter-party, and so remained for a long time, to wit the whole time in the declaration mentioned, during which the said ship remained unloaded: whereby, and by reason of the premises, and on no other account whatsoever, defendants could not, although they were during all the time last aforesaid ready and willing so to do, safely or securely load on board the said ship in turn from their said factors at *Port Talbot* aforesaid a full and complete cargo of coals, or coal and coke, at their option, or any part thereof, according to the terms of the said charter-party. Verification.

Replication: De injuriâ. Issue thereon.

On the trial, before *Coltman* J., at the *Glamorganshire* Summer assizes, 1845, it appeared that, the charter-party being as above stated, the *Jane*, on 13th *March*, 1843, arrived at the lock gates at the entrance of *Port Talbot*, having a proper pilot on board. The harbour-master(*a*) ordered the *Jane*, and another vessel, the *Thames*, which was astern of her, to pass into the lock. In so doing, the *Thames* hauled up faster than the *Jane;* and they came into contact. The harbour-master's attention was called to the circumstance; and he ordered the *Jane* to heave briskly ahead: but the ships became jammed together; and, the tide ebbing, the *Jane* was suspended between the *Thames* and the side of the lock till the next morning. It was necessary to remove her ballast; and she sustained some

(*a*) See p. 719, note (*a*), post.

injury: and, in consequence of the accident, she lost the turn of loading which she would otherwise have been entitled to, and was detained several days before she received her cargo: but it did not appear that, when ready, she met with any undue delay in loading. For the plaintiff it was contended that the mischief resulted unavoidably from the harbour-master permitting the *Thames* to follow the *Jane* too closely into the lock. The defendants called several witnesses to shew that the accident would not have happened if the crew of the *Jane* had obeyed directions which the harbour-master gave, and had "heaved" the ship by the winch instead of "hauling," as it appeared they did, by hand. *Coltman* J. was of opinion that, on the first two issues, taken by themselves, the defendants were entitled to a verdict, if they had loaded the cargo within a reasonable time after the ship was ready to take her turn; but that the general result of the cause must depend upon the question which, in his view, arose upon the third issue, namely, whether the mischief was occasioned by fault in the crew, or by misconduct of the harbour-master in sending the *Thames* forward before the *Jane* had gained a proper berth. He left this question to the jury, and directed a verdict for the defendants on the first and second issues, reserving leave, however, to move to enter a verdict on these for the plaintiff, if the Court should dissent from his ruling. Damages were assessed conditionally on these issues; and the jury found for the defendants on all.

Chilton, in *Michaelmas* term, 1845, obtained a rule to shew cause why a verdict should not be entered for the plaintiff on the first and second issues. As to these he contended that, the vessel having arrived at *Port Talbot*,

the freighters were answerable for any delay in the loading, or at all events were bound to shew the excuse by plea: and he cited *Abbott on Shipping*, 306, 307 (8th ed.), where it is said that, when, in a charter-party, the time is "expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part; for he has engaged that it shall be done." He also moved for a new trial on the grounds that the jury were misdirected on the third issue, and that the verdict was against the evidence; contending that no misconduct in the crew was proved, and that, at all events, when the accident happened, they were under the controul of the harbour-master, and therefore the ship was not under the "care, direction and management" of the plaintiff (*a*). A rule nisi was granted.

Martin and *Benson* now shewed cause. First, as to the third issue: although the local act and by-laws gave an authority and right of superintendence to the harbour-master and pilot, the vessel was under the actual and immediate "care, direction and management" of the master and crew as stated in the third plea; and the owner is responsible for the misconduct on their part which, in point of fact, caused the mis-

(*a*) It was also urged, on the argument in support of the rule, that the learned Judge, in summing up, put the case too unfavourably to the plaintiff, in point of law, on the question whether or not the master and crew had contributed to the accident by their own mismanagement: and *Davies* v. *Mann* (10 *M.* & *W.* 546.) was cited. But the Court thought that the case had been well left to the jury, and that their decision on the fact was conclusive. And Lord *Denman* C. J. observed that, in such an action as this, the fact of the plaintiff having contributed to the injury was quite sufficient to prevent the defendant's being held liable on the contract.

carriage in question. The clauses of stat. 4 & 5 *W.* 4. *c.* xliii. (*a*), giving certain authority to the harbour-master and pilot, do not exclude the controul of the ship's

(*a*) Stat. 4 & 5 *W.* 4. *c.* xliii., local and personal, public, "for improving the port and harbour of *Aberavon* in the county of *Glamorgan*," incorporates, by sect. 1, a company for making &c. and improving the port and harbour of *Aberavon* (called in the above reported case *Port Talbot*), and the entrance or channel thereof, and the river *Avon*, in the county of *Glamorgan*.

Sect. 51 enacts: "That it shall be lawful for any person appointed in pursuance of this act" (by the company, under sect. 48) "to act as harbour master within the said port and harbour of *Aberavon* to direct any person having the command of any vessel entering into or being within the said port and harbour to moor, anchor, and place the same in such situation within the said port and harbour as the said harbour master shall direct; and in case the master of such vessel shall refuse or neglect to remove the same as soon as may be after being required, and to moor, anchor, and place the same as the said harbour master shall direct, he shall for every such offence forfeit and pay any sum not exceeding 10*l.*; and it shall be lawful for the said harbour master and such other persons as he shall call to his assistance to remove or cause to be removed the said vessel in such manner as he shall deem necessary; and such master shall pay all the charges and expences attending the removing such vessel after such direction, refusal, or neglect as aforesaid, such charges and expenses to be recovered" &c. (as directed by sect. 87); "and if any person shall prevent or impede the removal of any such vessel, such person shall forfeit" &c. as above.

Sect. 72 enacts: "That it shall be lawful for the said company to appoint and license fit and proper persons to act as pilots and hoblers for the purpose of conducting into and out of the said port and harbour ships and vessels resorting thereto, by annual warrant or license," which they may revoke at their pleasure, and imposes a penalty on any person taking upon himself to act as a pilot or hobler to any ship or vessel entering into or going out of the said port and harbour without having authority so to do by such annual warrant or license.

Sect 73 imposes a penalty if the master, owner, &c. of any vessel inward or outward bound shall refuse to take on board and employ a licensed pilot who shall offer his services (except such vessel shall be laden with limestone) &c.

There were also by-laws, made by the Company for the regulation of pilots and hoblers, and vessels, using *Port Talbot*, and of the masters &c. belonging to such vessels. Among them were the following.

"3. Any pilot or hobler disobeying or disregarding the orders of the

master and crew; nor, indeed, do the duties on one part and the other conflict; for the harbour-master's business is only to direct the placing of a ship in the port and harbour, and the pilot is only to guide her course: a fault in working the ship cannot be imputed to either. At all events, if the harbour master gives orders which are disregarded, the owner cannot excuse himself by an authority which the master and crew have rejected. The learned Judge's direction, therefore, was right. Then, as to the first and second issues: the ship was loaded in reasonable time, and loaded in turn, within the meaning of the charter-party. Reasonable time would commence when the ship was brought to the place of loading (which is distinct from the port generally; *Brereton* v. *Chapman* (*a*), *Brown* v. *Johnson* (*b*);) in a proper state for receiving a cargo. It was a condition precedent that the ship should present herself, ready to be loaded. And the turn would be the ship's proper turn, after she had appeared in such readiness. Such being the rules, no negligence ap-

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harbour master while approaching or passing through the lock, or with respect to the berthing of any vessel in the port, will be liable on conviction to a fine not exceeding 40*s*."

"5. Every master of a vessel above 25 tons register burden bound inwards, except such vessel shall be laden with limestone, shall employ a licensed pilot" (by rule 7, the first who offers) "provided the vessel be boarded outside the outer buoy:" (Excuse, in case there should not be a sufficient number of pilots, &c.; penalty in other cases.)

"10. Every pilot in charge of a vessel inward bound shall conduct such vessel to whatever berth she may have orders to proceed without quitting her, unless he shall have permission from the master; and any pilot refusing to conduct a vessel under his charge beyond the lock, when required to do so by the harbour master or the master of such vessel, shall be liable to forfeit such pilotage."

(*a*) 7 *Bing.* 559. (*b*) 10 *M. & W.* 331.

pears on the part of the defendants; nor did it lie upon them to shew in pleading why the ship could not take her turn sooner. This case is unlike *Leer* v. *Yates* (*a*), which may be referred to on the other side: there the action was brought on a positive contract for demurrage, the shippers of goods engaging with the ship-owner that the goods should be taken out "in twenty days after arrival" or that they would pay a demurrage of 4*l.* a day: and, unloading of the goods having been delayed without fault on either side, the only question was, who, under such a contract, was to lose the stipulated amount per day. It was held that the loss must fall upon the owner of the goods; but the cases of this class have been thought to go a great length: and the doctrine was qualified at least in *Rogers* v. *Hunter* (*b*) and *Dobson* v. *Droop* (*c*), in the former of which cases Lord *Tenterden* said (after referring to *Leer* v. *Yates* (*a*)): "I have great difficulty in saying that, when the consignee has had no opportunity of taking his goods within the time stipulated, he is bound by the contract to pay for not doing so; he cannot, I think, in that case, be said to detain the vessel." And, in *Harman* v. *Gandolph* (*d*), though the strict rule was recognized, *Gibbs* C. J. grounded it on the consignee's express adoption of the contract with the ship-owner.

Chilton, *Davison* and *Hurlstone*, contrà. As to the third issue: the facts alleged and proved do not amount to any excuse for the breach. Even if the accident was a sufficient cause for the delay, the plaintiff is not responsible for it. The master was obliged to

(*a*) 3 *Taunt.* 387.
(*b*) *M. & M.* 63.
(*c*) *M. & M.* 441.
(*d*) *Holt, N. P. C.* 35.

take a pilot, and the pilot to obey exclusively the orders of the harbour-master: the plaintiff, therefore, had not, as was pleaded, the management of the ship. As to the first and second issues: reasonable time would, primâ facie, run from the moment when the ship, being tight, staunch &c., arrived (as she is admitted to have done) at *Port Talbot*. If any thing prevented the time from so running, the defendants ought to have pleaded it. The delay might or might not have had a valid excuse: the only valid excuse would have been that the master and crew were in some respect to blame: but that ought to have been stated on the record. *Randall* v. *Lynch* (*a*) shews that, where neither party is to blame, the freighter is liable to the ship-owner if the vessel be kept beyond the proper time. There the action was brought for damages, the ship having been detained because the cargo could not be unloaded in consequence of the crowded state of the docks; and the plaintiff recovered. Lord *Ellenborough* said: "The person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so." A motion was made in arrest of judgment (*b*); but no step was taken to impeach this ruling. *Leer* v. *Yates* (*c*) was decided on the same principle. And it is thus expressed in *Abbott on Shipping*, 310. (8th ed.): "It has been determined, that delays in loading a vessel beyond her running days, occasioned by frost, or by the prohibition of a foreign government to export the stipulated cargo, or by custom-house regulations or restraints,

(*a*) 2 *Camp.* 352.
(*b*) *Randall* v. *Lynch*, 12 *East*, 179.
(*c*) 3 *Taunt.* 387.

or by unlawful seizure of some part of the cargo by custom-house officers, are misfortunes and casualties which fall upon the freighter. He might have protected himself by express stipulation—he might have limited his engagement to pay demurrage to cases of wilful or negligent detention, — for delays occasioned by the wrongful act of others, he has his remedy against them ; — but unless they be caused by the shipowner himself, the freighter or consignee must pay demurrage according to his contract." The defendants here were subject to the liability pointed out by these authorities, unless they pleaded something in avoidance. It lay on them either to shew that they loaded the ship in a reasonable time after she arrived in good condition at *Port Talbot*, or to excuse themselves for not having done so by some matter subsequent. [*Wightman* J. You contend that they should have pleaded in confession and avoidance. But what had they to confess, as to matter occurring subsequently to the arrival? All that they could have stated would have been no more than an argumentative denial of the allegation that they did not load in reasonable time.] At all events that answer does not meet the objection on the second issue.

Lord DENMAN C. J. First, as to the third issue. The plea alleges that the plaintiff had the care, direction and management of the ship, and that, before the defendants could load her, the plaintiff, being master, and the crew, took such bad care of the ship and governed and navigated her so unskilfully that, by their carelessness, unskilfulness and mismanagement, the ship was injured and unfit to receive a cargo. That was entirely matter of evidence; and the Judge is not dissatisfied

with the conclusion the jury have come to. I think that the master was proved to have had the direction of the ship, and that the plea was made out. If so, it follows that the other pleas were proved also. The term "reasonable time" in the declaration means a space of time within which the ship may, with proper speed, be unloaded, whenever she is in a condition for that process; not a reasonable period to be dated from a given time. So as to the turn. If there had been an express stipulation that she was to be unloaded between ships number 1 and number 3, it might have been necessary to plead in excuse: but the terms of this contract imply only that she was to have her turn when she was ready to take it. Her turn was not come if she was not in a situation to take advantage of it.

COLERIDGE J. I agree, as to the first two issues, that the reasonable time for loading, and the turn, came only when the ship was in a condition to take advantage of them. On the third issue I had more doubt. But I think that it is a question on the construction of the plea, whether having the care, direction and management means having the legal or the actual care. It appears to me that the meaning here is the latter; and that the care and management spoken of in the commencement of the plea must be understood in a sense correlative to that of the "carelessness" and "mismanagement" charged in the latter: these are clearly imputed to the master and crew: and the jury have found the fact conformably to the plea.

WIGHTMAN J. As to the first two issues: the charter-party mentions no specific time for the loading:

it appears only that the ship is to be loaded when she arrives at *Port Talbot*, and in turn. The first breach assigned is, that the defendants did not load within a reasonable time after the ship's arrival; and to that a simple traverse is pleaded, on which the verdict is for the defendants. It has been argued that, on this contract, they could not set up matter of excuse from unavoidable causes of delay: but I think it was competent to them to shew that they loaded within a time which was reasonable under the circumstances; and I think also that they could not safely plead in confession and avoidance. They might perhaps have done so if the contract had been to load within three days; but how could they admit that they did not load within a reasonable time? Their defence is that, under all the circumstances, they did. As to the second breach, not loading in turn, the question is not quite so clear. But I think loading in turn must have meant loading as soon as they had a turn; and, as to that fact, the only evidence is that, as soon as they were capable of loading, they did. Before then they could have no turn. That seems to me the only reasonable construction. As to the third plea, it is argued that the excuse there alleged is not borne out, because the vessel was under the direction of the harbour-master and a pilot. But, for all the purposes of this defence, the vessel was under the management of the master and crew. For certain purposes, the harbour-master and pilot had the direction; but the master and crew directed the navigation; the management of the ropes and all the mechanical working of the ship were under their care. I think, therefore, that the allegations of that plea were made out. How far the fault of any other person than the master and crew con-

tributed to the injury was entirely a question for the jury.

ERLE J. The defendants did not contract by this charter-party to load until their turn came; and the turn was, not when the ship should have been one day or any other competent time in the bason, but when she should have been there for such a time, and should be in a condition to receive a cargo. If, for instance, at the expiration of such a time she had been in a damaged state by reason of a fire, it would be idle to say that she was in turn to load. I think that, for the purposes of this case, the ship was loaded in turn, and in reasonable time. As to the third issue, the argument is that, because the vessel was under the direction of a harbour-master and pilot, the master and crew were not responsible for hauling instead of heaving. But it would be very strange to say that these acts took place under the direction of the harbour-master, when they were done in direct contradiction to his orders. And it appears that no case of joint negligence in the master and crew and in other parties was made out.

Rule discharged.

SLATER and Others *against* HODGSON, Esquire, REES, Clerk, and TURNER.

Saturday, November 20th.

ASSUMPSIT on certain feigned issues.

In *April* 1844, the defendants *Hodgson* and *Rees*, who were justices of the peace for *Cumberland*, had, under stat. 13 & 14 *C.* 2. *c.* 12. *s.* 21., appointed separate overseers for eight townships of the parish of *St. Cuthbert, Carlisle*. That parish consisted of nine townships, the eight above mentioned, and *English Street*; which last had, for a long period, had overseers separately appointed. On the part of one of the eight townships, *Botchergate*, a rule nisi was obtained by *Watson*, in *Trinity* term 1844 (in the Bail Court, before *Wightman* J.), for a certiorari to bring up the appointments for the nine townships in order to their being quashed. In *Hilary* term, 1845 (*a*), *Knowles* and *Hugh Hill* shewed cause, and *Watson* and *Joseph Addison* supported the rule. The Court then directed that the present action should be brought.

The first count of the declaration contained eleven issues, of which the plaintiffs maintained the affirmative and defendants the negative. Among these were: 1. Whether the parish of *St. Cuthbert* had immemorially consisted of four quarters, commonly known by names therein mentioned, or by some other; 6. Whether, for the full period of sixty years next before the passing of stat. 59 *G.* 3. *c.* 95., that part of the parish

On trial of an issue, a bond to indemnify parish officers against the charge of a bastard was offered in evidence. It was dated in 1716, and was brought from a chest, kept in the workhouse of a Union comprehending the parish, in which chest were kept muniments belonging to the Union. There was no direct evidence how it was placed in the chest: but it was proved that, in 1842, several documents were brought in a cart to the workhouse by a pauper, and placed in the chest.

Held, that enough appeared to satisfy the rule of proving deeds to be brought from a proper depository; and that the evidence was admissible.

(*a*) *January* 14th, before Lord *Denman* C. J., *Patteson, Coleridge* and *Wightman* Js.

which was situate within the city of *Carlisle*, and the liberties thereof, had been separately assessed to the relief of the poor; 7. Whether, for the same period, separate overseers had been appointed for the same part of the parish; 10. Whether all the quarters and townships of the parish which lay without the city and liberties had usually, until the year 1844, been jointly assessed to the relief of the poor; 11. Whether overseers had usually, until 1844, been appointed for the same quarters and townships jointly. The second count contained four issues, of which the plaintiffs maintained the negative and the defendants the affirmative. Among these were: 2. Whether *English Street* township was, previously to 1844, a separate township usually maintaining its own poor, under stat. 13 & 14 *C.* 2. *c.* 12.; 3. Whether the said township was, previously to 1844, a separate township with overseers appointed and chosen for it under the last mentioned statute; 4. Whether the parish of *St. Cuthbert* "has been or is prevented, by reason of the largeness thereof, from reaping the benefit of" stat. 43 *Eliz.* *c.* 2.

On the trial, before *Cresswell* J., at the last *Cumberland* assizes, the plaintiffs offered in evidence several bonds, given to the parish officers of the parish of *St. Cuthbert*, for indemnification from the charges of bastards. The earliest of these was dated A. D. 1716. They had been found in a chest kept in the workhouse of a Union which comprehended all the townships. The master of the workhouse stated that the chest contained muniments belonging to the Union; that, in 1838, when he first came to the workhouse, the chest was not there; but that, in 1842, a pauper brought in a cart a quantity of documents which the witness took

in; and that he, the witness, placed them in the chest in question: but he could not say whether the particular documents were among these. On the part of the defendants it was objected that the bonds could not be given in evidence. The learned Judge admitted them. Verdict for the plaintiffs on all the issues above described; for the defendants on the others. On an earlier day in this term (*a*),

Knowles, on the part of the defendants, moved for a new trial, on the ground of the improper reception of evidence, and on other grounds, not now material. A fuller account ought to have been given of the custody of these documents. It did not appear in what custody they had been up to the year 1842. [*Erle* J. But is it not enough that they are finally found in proper custody?] They ought to have been more distinctly traced, so as to shew that the custody was proper: nothing is known of their previous history.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

We have conferred with the learned Judge who tried this cause; and he has referred to his notes of the trial. It appears to us that there has been a reasonable compliance with the rule that documents like these should be shewn to come from the place where they would naturally be deposited. The learned Judge therefore did right in receiving the evidence.

Rule refused.

(*a*) *November* 5th. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

Friday, November 20th.

MARY GALE, Executrix of JOHN WARE, *against* LEWIS.

In assumpsit to recover from an Insurance Company the amount secured by a policy in favour of *W.* on his own life,

ASSUMPSIT against the Secretary of the *West of England* Fire and Life Insurance Company, for non-payment of 1200*l.* due on a policy to that amount, effected by *John Ware* on his own life.

defendant (the secretary) pleaded bankruptcy of *W.* Replication: That, before the bankruptcy and the making of the policy, one *D.*, in whose right the present action was brought, agreed with *W.* to lend him 1000*l.*, which should be secured by a policy of insurance on *W.*'s life: That *R. L.*, an attorney, acted in the said business of the said agreement as attorney for the lender, and that, in pursuance of the agreement, *R. L.*, then being also an agent for the Company, duly authorized in that behalf, in and about effecting life insurances with them, and otherwise, caused the policy to be effected on *W.*'s life for the purpose and on the terms aforesaid, and took possession of the policy, on behalf of *D.*, the lender, in pursuance of the agreement, and for the purpose and on the terms aforesaid, and that the policy was never in the hands of *W.* or his assignees: That *D.* thereupon lent *W.* the 1000*l.*, and *W.*, in pursuance of the agreement, assigned the policy by indenture to *D.*: That the debt, exceeding the amount secured by the policy, was, at the time of the bankruptcy, and is, unpaid: And that, before the bankruptcy, *D.*, the lender, for the purpose of keeping up the policy, paid to the Company, and they received from him, divers sums for premiums in and about keeping the policy on foot and preserving to *D.* the benefit of it: Which said premises respectively the Company, before and at the time of the bankruptcy, well knew.

Rejoinder, that *W.*, when he became bankrupt, had the chose in action in his possession &c. by consent of *D.*, the true owner, and was then reputed owner thereof. This allegation was traversed, and issue joined on the traverse.

On the trial, it appeared that the policy and assignment were effected at *Tiverton*, where *R. L.* was at that time transacting insurance business for the Company as their agent, receiving and transmitting to them (their office being at *Exeter*) instructions for policies and money for premiums, settling losses, and receiving agency fees. No actual notice of the assignment was ever given to the Company; but the plaintiff's counsel relied upon the facts stated in the replication, and not traversed, as proving, by admission on the defendant's part, that *R. L.*, as the Company's agent, had effected the policy and knew of the assignment; and they contended that such knowlege by him was, in effect, notice to the office. The Judge allowed the facts to be so put to the jury, and did not permit a reply. Verdict for plaintiff.

Held, on motion for a new trial, that some of the facts stated in the replication were not traversable, and, therefore, assuming that the others might properly have gone to the jury as admitted, a new trial must be granted.

Quære, whether, if all the substantial facts relied upon by the plaintiff had been proved, the attorney's knowledge was a knowledge by the Company, equivalent to notice.

A new trial being granted on the above objection (and for an inaccurate expression in the Judge's charge to the jury), it was proved on the second trial that the Company had authorized *R. L.* to receive notices on their behalf, and had agreed that a notice to him should be as valid as a notice to them at their office.

Held that, under these circumstances, knowledge by *R. L.*, as above stated, was equivalent to notice served on the Company.

Although *R. L.* acquired such knowledge, not in the form of a communication to the Company, but as attorney for the assignor and assignee.

Plea: Bankruptcy of *Ware*, and appointment of assignees (setting out the proceedings), by reason whereof, and by force of the statute &c., the assignees became and were, until and after his death, entitled to the sum assured by the said policy, &c. Verification.

Replication: That, before the bankruptcy and fiat, and before the making of the policy, and of the indenture after mentioned, and before the commencement of this suit, viz. on 4th *December* 1838, it was agreed between the said *John Ware* and one *Thomas Densem* that he the said *T. D.* should advance to the said *J. W.* 1000*l.*, and that the same, with interest at 5*l.* per cent., should be secured to *T. D.* by a mortgage of certain property, and by an assignment of a policy of insurance to be effected for that purpose upon the life of the said *J. Ware*, and the moneys to be receivable on the said policy; and one *Robert Loosemore*, then being an attorney and solicitor of the superior Courts of *Westminster*, then acted in the said business of the said agreement for and on behalf and as the attorney and solicitor of the said *T. D.*: and, in pursuance of the said agreement so made as aforesaid, he the said *R. Loosemore*, then also being an agent of and for the said Insurance Company, duly authorized in that behalf in and about the effecting of insurances on lives with the said Company and receiving premiums of insurance and otherwise for the said Company, then caused the said policy of assurance to be made and effected on the life of the said *J. Ware* for the purpose and upon the terms aforesaid, and then received into his hands and possession the said policy from the said Company for and on behalf of the said *T. D.* in pursuance of the said agreement and employ as aforesaid, and for the pur-

pose and upon the terms in that behalf aforesaid: and the said policy was not, at any time whatsoever before or at the time when *J. Ware* became bankrupt, or at any other time afterwards, in the hands of *J. Ware* or of his said assignees. Averment that, thereupon, and in pursuance of the said agreement as aforesaid, and before *J. Ware* became bankrupt, and before the commencement of this suit, to wit on 28th *December*, 1838, the said *T. D.* advanced and paid to *J. Ware* the said 1000*l.* so agreed to be advanced &c., upon the terms aforesaid: and, by a certain indenture then made between the said *J. Ware* of the one part and the said *T. D.* of the other part and duly sealed and delivered by *J. Ware*, after reciting the said policy and the said agreement, the said *J. Ware*, in pursuance of the said agreement, and in consideration of the 1000*l.* so paid to *J. Ware* by *T. D.*, did, amongst other things, assign and transfer to *T. D.*, his executors &c. and assigns, all the said policy of insurance for the said sum of 1200*l.*, being the same policy &c., and all the moneys to become receivable thereon, and all the right, title, &c., of *J. Ware* of, in, to or out of the said policy. That, before and at the time of *J. Ware*'s becoming bankrupt, the said 1000*l.* remained wholly due from and unpaid by him, together with 300*l.* interest; and thence continually up to and at the death of the said *J. Ware*, and hitherto, the said principal sum of 1000*l.*, and interest, have remained unpaid, and the same are still unpaid, together exceeding the said sum for which the said policy was so made as aforesaid. And that, after the making of the policy, and before *J. Ware* became bankrupt, and before the commencement of this suit, to wit on &c., and on divers other days &c., the said *T. D.*, for the purpose of

keeping the said policy on foot and of preserving to himself the benefit of the same as such security as aforesaid, paid to the said Insurance Company, and they then received of and from *T. D.*, divers sums &c., amounting &c., for premiums and otherwise in and about the keeping on foot of the said policy as aforesaid: which said premises respectively the said Insurance Company, before and at the time when the said *J. Ware* became bankrupt as aforesaid, well knew. Verification.

Rejoinder: That the said *John Ware*, at the time he so became bankrupt as aforesaid, by the consent and permission of the said *T. Densem* the true owner thereof, had in his possession, order and disposition the said chose in action and cause and right of action in respect of the said sums of money receivable upon the said policy, of which said chose in action and cause and right of action the said *J. Ware* was, at the said time when he so became bankrupt as aforesaid, reputed owner. Verification.

Surrejoinder: That *J. Ware*, at the time when he so became bankrupt, had not, by the consent &c., in his possession, &c., the said chose in action &c.; and that he was not, at the time &c., reputed owner &c., in manner and form &c. Conclusion to the country. Issue thereon (*a*).

On the trial, before *Patteson* J., at the *Bristol* summer assizes, 1844, the defendant's case was opened first. It appeared that the policy was executed and assigned

(*a*) Actions having been brought against the Company on the policy, both by the representatives of *Densem*, who had died, and by *Ware*'s assignees, and the Company professing to have no interest in the question, it was ordered by a Judge that, to try the right, an action should be brought in the name of *Ware*'s executrix, and defended by *Ware*'s assignees in the name of the Company's secretary.

for the purpose stated in the pleadings, but that no actual notice of the assignment was given to the Insurance Company. Their office was at *Exeter*. At the time when this policy was effected, *Loosemore*, an attorney at *Tiverton*, was doing insurance business for the Company to a large amount. He was not one of their public advertised agents, but acted (as a witness deposed) "in the capacity of an agent," receiving instructions on behalf of the Company for policies, transmitting such instructions to the office, receiving and paying over the premiums, settling accounts for losses (on remittance from the Company), keeping an account current with them, and being paid agency fees. Other attorneys, elsewhere, acted for the Company in the same manner. The plaintiff's case was that, although the Company could not be proved to have received formal notice of the assignment, their agent, *Loosemore*, had been privy tothat transaction, as well as to the effecting of the policy: and endeavours were made, on cross-examination, to shew that premiums on the policy had been transmitted to the Company by *Loosemore*. The plaintiff's counsel, in opening her case to the jury, insisted upon *Loosemore*'s privity to the insurance and assignment, and, in proof of it, referred to certain averments of fact in the replication, which, not being traversed, were, as he assumed, admitted on the record. The facts were, the agreement between *Ware* and *Densem* that the money lent by *Densem* should be secured to him by assignment of a policy of insurance to be effected for that purpose on *Ware*'s life: that *Loosemoore* acted in the business of the agreement as the attorney of *Densem*, and that, in pursuance of the agreement, he, then also being agent for

the Insurance Company, duly authorized in that behalf in and about the effecting of insurances and receiving premiums, caused the policy to be effected for the purpose and on the terms aforesaid, and received into his hands the policy from the Company for and on behalf of *Densem* in pursuance of the said agreement and employ, and for the purpose and on the terms aforesaid, and that the policy never had been in the hands of *Ware* when he became bankrupt: that *Ware* assigned the policy to *Densem* in pursuance of the agreement: that, at the time of the bankruptcy, and hitherto, the 1000*l.* and interest were wholly due and unpaid &c.: and that the Company, before and at the time when *Ware* became bankrupt, well knew the said premises.

It was urged, on the defendant's part, that these allegations, not being traversable, were not to be considered as admitted, and, consequently, did not dispense with proof at the trial, and that a statement of them without proof would entitle the defendant to a reply. The learned Judge held that all traversable facts stated in the replication were evidence in the cause, and that a statement of them did not entitle the defendant to a reply; but that it would be otherwise if the facts stated from the replication without proof were not traversable. The plaintiff's counsel called no witness; and a reply was claimed, on the ground that facts had been stated which the defendant had not admitted. The learned Judge did not allow a reply. In summing up, he told the jury that the material question was whether or not the Company knew of the assignment: and he referred to the replication as shewing, without subsequent contradiction, that *Loosemoore* effected the policy (of which, his lordship observed, there was some other evidence in the case, though not enough without the aid of the

pleadings); and also, that he, being their agent, duly authorized in and about effecting the policy, caused it to be effected, and received it from the Company, for the purpose and upon the terms of the agreement between *Densem* and *Ware*. He added, in conclusion: "The whole question for your consideration is, whether you believe Mr. *Loosemoore* was the agent for effecting this policy on behalf of the Company: whether he knew the fact that it was assigned to Mr. *Densem* for his benefit before and at the time of the bankruptcy of *Ware*; and whether you consider that the knowledge of *Loosemoore* is the knowledge of the office." "If you think it was the knowledge of the office, the plaintiff is entitled to your verdict: if you think the office did not know any thing of it, and do not consider what *Loosemore* knew as their knowledge, then of course the defendant is entitled to your verdict." Verdict for plaintiff.

Rogers, in the ensuing term, moved for trial on the grounds: 1. That the verdict was against the weight of evidence. 2. That the concluding direction to the jury was incorrect. 3. That the statements in the replication were improperly left to the jury as evidence. On the first and second points, *Rogers* contended that, even if the facts relied upon for the plaintiff were proved, the knowledge ascribed to *Loosemoore* was not either such a notice to the company, or such a notoriety, as could take the case out of the operation of stat. 6 *G.* 4. *c.* 16. *s.* 72.; that the question, on this point, was left to the jury in too limited a form, and appeared to place before them a question of law rather than of fact; and that it should have been put to them in the manner pointed out by *Tindal* C. J. in *Edwards* v. *Scott* (*a*). On the third

(*a*) 1 *Man. & G.* 962.

point he referred to *Edmunds* v. *Groves* (*a*) and *Bennion* v. *Davison* (*b*), and contended that the untraversed statements in the replication could not be taken as admitted unless they were material and traversable; but that several statements in the present replication, which had been submitted to the jury, were not traversable at all, or not so in that stage of the pleadings. Such were the allegations, that the policy was effected "for the purpose and upon the terms aforesaid;" that *Loosemoore* acted as attorney for *Densem;* that he received the policy for and on behalf of *Densem;* and that it was not afterwards in the hands of *Ware;* that the premiums were paid to the Company by *Densem;* and that the Company "well knew" the "said premises respectively" before the bankruptcy. A rule nisi was granted.

In *Michaelmas* vacation (*December* 6th), 1845 (*c*), and *Hilary* term (*January* 12th), 1846 (*d*),

Crowder and *Butt* shewed cause, and *Rogers* and *Greenwood* snpported the rule. The course which the case ultimately took makes a further report of the arguments unnecessary. The principal authorities cited were: On the first two points; as to the circumstances under which an Insurance Company might be considered as having notice that a policy was assigned, the necessity of such notice to them, and the description of agent from whose knowledge theirs might be inferred; *Tibbits* v. *George* (*e*), *Smith* v. *Smith* (*g*). *Burgh* v. *Legge* (*h*), *Ex*

(*a*) 2 *M. & W.* 642.
(*b*) 3 *M. & W.* 179.
(*c*) Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js.
(*d*) Before the same Judges.
(*e*) 5 *A. & E.* 107.
(*g*) 2 *Cro. & M.* 231.; *S. C.* 4 *Tyr.* 52.
(*h*) 5 *M. & W.* 418.

parte Carbis, *In re Croggon* (*a*), *Ex parte Patch*, *In re Loosemoore* (*b*), *Ex parte Watkins*, *In re Kidder* (*c*), *West* v. *Reid* (*d*), *Williams* v. *Thorp* (*e*), *Acey* v. *Fernie* (*g*), *Lowther* v. *Carlton* (*h*), *Warrick* v. *Warrick* (*i*), *Drake* v. *Marryat* (*k*), *France* v. *Woods* (*l*), *Worsley* v. *The Earl of Scarborough* (*m*), *Hiern* v. *Mill* (*n*), *Ryall* v. *Rowles* (*o*), *Jones* v. *Gibbons* (*p*), *Timson* v. *Ramsbottom* (*q*), *Ex parte Smith* (*r*), *Ex parte Rose* (*s*), *Ex parte Heathcoate* (*t*), *Gibson* v. *Overbury* (*u*), *Falkener* v. *Case* (*x*), *Le Neve* v. *Le Neve* (*y*), *Maddox* v. *Maddox* (*z*), *Ashley* v. *Baillie* (*aa*), 2 *Sugd. Vend. & P.* 1041. (*bb*) (ch. xxiii. sect. 1. § 8, &c.), *Everett* v. *Desborough* (*cc*), *Lyon* v. *Weldon* (*dd*), *Dean* v. *James* (*ee*), *Ex parte Hennessey* (*gg*).

On the last point, in addition to the cases before mentioned, *Bingham* v. *Stanley* (*hh*), *Smith* v. *Martin* (*ii*), *Robins* v. *Viscount Maidstone* (*kk*), *Carter* v. *James* (*ll*),

(*a*) 4 *Deac. & Ch.* 354.
(*b*) 7 *Jurist*, 820. (Court of Review.)
(*c*) 2 *Mont. & Ayr.* 348.
(*d*) 2 *Hare*, 249.
(*e*) 2 *Sim.* 257.
(*g*) 7 *M. & W.* 151.
(*h*) 2 *Atk.* 241.
(*i*) 3 *Atk.* 291. 294.
(*k*) 1 *B. & C.* 473.
(*l*) 1 *Tamlyn*, 172.
(*m*) 3 *Atk.* 392.
(*n*) 13 *Ves.* 114. 120.
(*o*) 1 *Ves.* sen. 348. 367.
(*p*) 9 *Ves.* 407. 410.
(*q*) 2 *Keen*, 35.
(*r*) 2 *M. D. & De G.* 213.
(*s*) 2 *M. D. & De G.* 131.
(*t*) 2 *M. D. & De G.* 711.
(*u*) 7 *M. & W.* 555.
(*x*) 1 *Bro. Ch. C.* 125.; *S. C.*, more fully, 2 *T. R.* 491., in the judgment of *Ashhurst* J. in *Lempriere* v. *Pasley*.
(*y*) 1 *Ves.* sen. 64.
(*z*) 1 *Ves* sen. 61.
(*aa*) 2 *Ves.* sen. 368. 370.
(*bb*) Ed. 11.
(*cc*) 5 *Bing.* 503.
(*dd*) 2 *Bing.* 334.; *S. C.* 9 *B. Moore*, 629.
(*ee*) 1 *A. & E.* 809, note (*a*).
(*gg*) 1 *Connor & Lawson's* (Irish) *Rep.* 559. (*Temp. Sugden.*)
(*hh*) 2 *Q. B.* 117.
(*ii*) 9 *M. & W.* 304.
(*kk*) 4 *Q. B.* 811.
(*ll*) 13 *M. & W.* 137. See also *Bonzi* v. *Stewart*, 4 *Man. & G.* 295.

were cited: also, as to the materiality of particular averments in the replication, *Buck* v. *Lee* (*a*) (also cited on the preceding points), *Edwards* v. *Scott* (*b*) (also cited on the preceding points), *West* v. *Reid* (*c*) (also cited on the preceding points), *Burridge* v. *Row* (*d*), *Hollingworth* v. *Brodrick* (*e*), *Semayne's Case* (*g*) (last resolution), *Dearle* v. *Hall* (*h*) and authorities there cited, *Watson* v. *Peache* (*i*), *Ex parte Wiggins*, *In re Nicholls* (*k*), *Walker* v. *Burnell* (*l*) (dictum of *Buller* J.), *Horn* v. *Baker* (*m*) (judgment of *Lawrence* J.): and, as to the immateriality of averments made in a too early stage of the pleadings, Sir *Ralph Bovy's Case* (*n*), *Harvey* v. *Reynold* (*o*), *Com. Dig. Pleader* (G 12.), *Hyde* v. *Watts* (*p*), *Winch* v. *Keeley* (*q*).

Cur. adv. vult.

Lord DENMAN C. J., in *Hilary* vacation (*February* 12th) 1846, delivered the judgment of the Court.

In this case a rule for a new trial was obtained, partly on the ground that the verdict was against evidence, and partly on two objections to the course taken at the trial by my learned brother who tried the cause.

First. The jury were told that certain facts averred in the replication, and not traversed, must be taken as admitted by the defendant, and received as facts in con-

(*a*) 1 *A. & E.* 804. 808.
(*b*) 1 *Man. & G.* 962.
(*c*) 2 *Hare*, 249.
(*d*) 1 *Y. & Coll.* (*V. Chanc.*) 183
(*e*) 7 *A. & E.* 40.
(*g*) 5 *Rep.* 91 *a.* 93 *a.*
(*h*) 3 *Russ.* 1.
(*i*) 1 *New Ca.* 327.
(*k*) 2 *Deac. & Ch.* 269.
(*l*) 1 *Doug.* 317. 320.
(*m*) 9 *East*, 215. 241.
(*n*) 1 *Ventr.* 217. See dictum of *Parke* B. in *Woods* v. *Durrant*, 16 *M. & W.* 149. 155.
(*o*) *Latch.* 200.
(*p*) 12 *M. & W.* 254.
(*q*) 1 *T. R.* 619.

sidering the particular issue on which they were to find. But we are of opinion that some of these facts, at least, were not traversable by the defendant, and consequently could not be considered as admitted because they were not traversed.

Secondly. On another point, which was discussed at great length, we are called upon to form some opinion, but can by no means undertake to express one very confidently: we mean the question whether the knowledge of one individual was the knowledge of the Company whom the defendant represents in this action. Some late decisions have certainly made it difficult to say what is the correct rule on that subject: yet we think that the question, as submitted to the jury, leaves the matter somewhat too much at large. The jury were asked whether the knowledge of their agent *Loosemore* was the knowledge of the Company: and they could hardly understand that their opinion was sought whether the Company was actually informed of the fact. If that had been so, we could not but have expected a different verdict. If, on the other hand, they understood the question to be whether a principal is bound by knowledge so possessed by his agent, we are not prepared to say that it can be a question of fact: it would rather appear to be a question of law, depending on facts found by the jury in each particular case.

Whatever view may be taken by the learned Judge who shall preside at the next trial will probably lead to more consideration of this now unsettled doctrine.

Rule absolute.

The cause was tried again, before *Erle* J., at the

Bristol Summer assizes in this year; when a verdict was again found for the plaintiff, the jury being of opinion, on the facts now proved (see pp. 742, 3, post), and stating, in answer to questions left to them by the learned Judge, that *Loosemore* did not mention the fact of the assignment at the head office at *Exeter*, but that the Company had authorized him to receive notices of assignment for them, and had consented that notice so received by him should be equivalent to a notice served upon the Company at their office.

Rogers, in this term (*a*), moved for a rule to shew cause why there should not be a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence; or (by leave reserved) why the verdict should not be entered for the defendant. The finding of the jury that *Loosemore* did not mention the assignment at the Company's head office negatives notice to them, and, to a legal intent, knowledge by them; and, upon that answer, the defendant was entitled to the verdict. There is no case which shews that an assignment can be binding where the head office has neither notice nor actual cognizance of it: and *Ex parte Hennessey* (*b*), in the *Irish* Court of Chancery, shews that in such a case the agent's knowledge cannot be deemed knowledge by the Company (*c*). Further, the knowledge possessed by *Loosemore* in this instance was

(*a*) *November* 5th. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

(*b*) 1 *Connor & Lawson*, 559.

(*c*) As to the second finding of the jury, *Rogers* contended that the power of the agent to bind the company by his receipt of notice had appeared by the evidence to exist only in the case of a fire policy. But *Erle* J. denied this.

not acquired by him as agent for the Company, but as attorney for an individual; and it was held in *Thompson* v. *Speirs* (*a*) that, to affect a Company with notice that a policy granted by them has been assigned, more is necessary than the mere knowledge, privately obtained, of a party connected with them. Sir *L. Shadwell*, V. C., said; "To take a policy of insurance out of the order and disposition of the assignor, it is essential to the interests of mankind, that something should be done of a decisive nature, which may effectually prevent the payment of the proceeds to any other person than the assignee" (*b*). In *Edwards* v. *Scott* (*c*), *Tindal* C. J., at nisi prius, directed the jury that a written notice was necessary; and, although he afterwards admitted that this ought not to have been left to them as a point of law, his own opinion does not appear to have changed.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This action was tried by the direction of the Court, to ascertain whether a policy of insurance upon the life of one *Ware*, effected in the *West of England* office at *Exeter*, was in his order and disposition at the time of his bankruptcy, with the consent of the true owner. The verdict was for the plaintiff; and a motion for a rule nisi to enter a verdict for the defendant, or for a new trial, has been made. It appeared that *Densem* agreed to lend 1000*l.* to *Ware*, provided he had, among other securities, a policy of insurance on the life of *Ware*; and he, *Densem*, gave directions to his attorney, *Loosemore*

(*a*) 13 *Sim.* 469.
(*b*) 13 *Sim.* 473.
(*c*) 1 *Man. & G.* 962.

of *Tiverton*, as to the policy, and as to the amount to be insured thereby by *Ware*. *Loosemore* accordingly transmitted proposals for a policy to the head office at *Exeter*, and obtained it therefrom, and delivered it to *Densem* without its ever having been in possession of *Ware*. *Ware* afterwards became bankrupt; and his assignees made the claim in question. The *West of England* Insurance Company have their head office at *Exeter*, and branch offices in some large towns, and employ attorneys as their agents in smaller towns; and *Loosemore* was so employed for the town of *Tiverton*.

The jury found: First. That *Loosemore* did not mention at the head office to those carrying on the business there that *Densem* was the beneficial owner. Secondly. That the Company did authorize *Loosemore* to receive notices of assignment on their behalf, and agreed that a notice to him should be as valid as a notice served upon the Company at their office.

It has been contended for the defendant that a notice ought to have been sent to the head office, and that notice to such an agent as *Loosemore* was not sufficient; and *Ex parte Hennessey* (*a*) was cited. But, on referring to that case, it appears that the *Dublin* Company expressly forbid their agents in the country to receive notices of assignments of policies; and therefore such a notice to an agent at *Cork* was void. But, as the *West of England* Company are found by the jury to have given authority to their country agents to receive such notices, the case has no application.

It was further contended that *Densem* communicated to *Loosemore* in his capacity of attorney, and not as agent for the Insurance office. But, where the two

(*a*) 1 *Connor & Lawson*, 55.

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capacities are united in one person, a notice received in one capacity for the purpose of being transmitted to the other is an effectual notice in both capacities.

Therefore there will be no rule.

Rule refused.

Friday, November 20th.

PHILLIPS *against* BROADLEY.

Defendant employed plaintiff, an attorney, in several transactions, and, among others, in procuring him money to pay off a mortgage. In an action against defendant on plaintiff's bill of costs, it appeared, by items in the bill, that he had made applications in several quarters for this purpose, but without success, after which he wrote to plaintiff, informing him what had been done, and requesting to know his wishes. This item bore date more than six years before action brought. The next, dated within six years, was; "Paid the postage of your answer." By subsequent items it appeared that further endeavours were made by plaintiff to raise the money. Ultimately it was obtained. Held that the transaction was not one in which the attorney's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take these out of the Statute of Limitations.

One *B.*, to whom the mortgage had been transferred, commenced actions of ejectment and other proceedings to enforce payment. Plaintiff acted as his attorney; and proceedings were stayed on condition, among others, that defendant (who was not a party on the record in the ejectments) should pay the now plaintiff his bill of costs delivered to *B.* Defendant paid plaintiff the bill, but afterwards (and before stat. 6 & 7 *Vict. c.* 73.), obtained a Judge's order for taxation of this latter bill, with a direction that any sum overpaid should be refunded. Plaintiff gave no consent to the order; but he attended the taxation, and made a new claim, which was allowed; and he was ordered by the allocatur to refund 10*l.* as overpaid.

Held that, in the action by plaintiff against defendant on his bill of costs, the 10*l.* could not be set off as money had and received to defendant's use; a Judge's order, without consent, being no ground for a claim in the nature of an action of contract.

DEBT for work and labour done by *Frederick Campbell*, deceased, and plaintiff, his surviving partner, for the defendant as his attorneys; and for fees, money paid, and on an account stated. The action was commenced *January* 12th, 1844.

Pleas. 1. Never indebted. Issue thereon. 2. Statute of Limitations. 3. Payment. 4. Set-off of money lent, money paid, money had and received, and money found due on an account stated. Issues were tendered and joined on the last three pleas.

On the trial, before *Wightman* J., at the *Yorkshire* Spring assizes, 1845, it appeared that the business in respect of which the plaintiff's claim arose had been

done at various times from *October* 1836 to *May* 1838, and consisted, in a great measure, of endeavours to raise money for the purpose of paying off a mortgage on an estate of the defendant. The particulars were stated in a bill delivered by plaintiff and *Campbell* to defendant, on which the question, as to this part of the case, turned. The most material items of the bill were as follows.

1836. "*October* 5th to *November* 10th. Attending you" &c.; "conferring on the state of your affairs, and your determination to offer for sale your estate at *Laxton*, and out of the proceeds thereof, after discharging Mr. *Duesbery*'s mortgage, to purchase an estate at *Leamington*."

. . . . . .

"*November* 18th. Attending Mr. *Saltmarshe* upwards of an hour this day; conferring relative to an agreement which he insisted you had entered into with him for the sale of *Laxton*." (Other items followed, as to a correspondence with *Saltmarshe*, &c.).

1837. "*February* 23rd. Attending and conferring with Mr. *Duesbery*, who had received a letter from your sister Miss *Broadley*, &c." . . . . .

"*October* 10th. Mr. *Duesbery*, the mortgagee of your estate at *Laxton*, having died, and the executor of his will having required payment of the principal money and interest due to him on the 8th *April* next; attending Messrs. *Shepherd* and *Simpson*, the solicitors of Mr. *Thornton Duesbery*, to ascertain if some arrangement could be entered into," &c.

"*October* 12th. Attending *Henry William Hutton*, Esq., who said that he should be able to advance the money at 4*l.* per cent. interest.

——— 17th. Attending Messrs. *Shepherd* and *Simpson*, who informed us that Mr. *Thornton Duesbery* had received a letter from your sister Miss *Broadley*, requesting him to accept immediate payment of 2000*l.*, part of the mortgage money, which he had agreed to do." . . . . . .

"*October* 25th. In consequence of Miss *Broadley*'s letter, attending Messrs. *Shepherd* and *Simpson*, when they stated that Mr. *Thornton Duesbery* would accept the whole sum of 6500*l.* on the 8th *January* next, if more convenient to you.

November 6th. Attending Mr. *Hutton* to ascertain if he would lend 4500*l.* to make up, with the 2000*l.* in the Bank, the whole sum of 6500*l.*, when he stated that he could not divide a sum of 5000*l.* trust money, but would not object to lend 5000*l.*

——— 7th. Writing to inform Miss *Broadley*, and for instructions as to what should be arranged.

December 3d. Paid the postage of Miss *Broadley*'s answer.

——— 6th. Attending Mr. *Hutton* on his calling to inform us that,

in consequence of an unexpected event in his family, the trust money he had proposed to advance would be required for other purposes; and he expressed his regret if you should be inconvenienced by it, &c.

Attending *John Barkworth*, Esq., of *Hull*, and several other parties, who we knew had money to advance, with particulars of the security, and explaining to them &c.; but they declined lending any money under the circumstances.

1838. *January* 3d. Writing letter to you, and informing you of what had been done, and requesting to be informed of your wishes relative to the transfer of mortgage, &c.

20th. Paid the postage of your answer.

22d. Paid the postage of a double letter from you, desiring us to send an artist to *Brantingham* to make a sketch of a fountain for you.

25th. Mr. *Phillips* being at *York*, his journey from thence to *Acomb* to see you and confer on the state of your affairs and the arrangement for the payment of Mr. *Duesbery*'s mortgage," &c.

Then followed items of subsequent dates in 1838, relating to the business of the mortgage and further endeavours to raise money for paying it off (which was at last accomplished), and to other transactions of an entirely different nature.

For the plaintiff it was contended that the business relating to the mortgage was continuous, and that the item of *January* 20th, 1838, being within six years of the commencement of the action, prevented the statute from attaching to the prior ones.

It further appeared that a person named *Bower* took a transfer of the mortgage from *Duesbery*, and afterwards commenced actions of ejectment and other proceedings to enforce payment of the mortgage money. In these, the now plaintiff *Phillips* and his late partner *Campbell* acted as attorneys for *Bower*; and proceedings were stayed on the condition, among others, that the now defendant should pay *Campbell & Phillips*'s bill of costs, which had been delivered to *Bower*. Defendant, on *March* 29th, 1841, paid the bill, amounting

to 166*l.* 16*s.* 4*d.*, for which *Campbell & Phillips* gave him their receipt and delivered up the title deeds. Defendant afterwards obtained the following order of a Judge for taxation of the bill.

"Doe dem. *Bower* and others *v.* *Roe.* *Eland*(*a*) tenant. } Upon hearing the attorneys or agents on both sides, I do order that Messrs. *Campbell & Phillips*'s bill for fees, charges and disbursements in this and other causes and matters, delivered to and paid by Mr. *Broadley*, be referred to the Master to be taxed; that the said *Campbell & Phillips* give credit for all sums of money by them received from or on account of the said Mr. *Broadley*; and that the said Messrs. *Campbell & Phillips* do refund what, if anything, there may on such taxation appear to have been overpaid.

"Dated the 23d day of *June*, 1841."

Campbell & Phillips did not give any actual assent to the taxation; but they attended, and submitted new items of demand, which were considered and allowed; and the master directed, by his allocatur, that they should refund to the now defendant 10*l.* 4*s.* 10*d.* This sum the defendant claimed to set off in the present action. On the plaintiff's part it was contended that the order to tax, being made before stat. 6 & 7 *Vict. c.* 73., was invalid; and, at all events, that the sum awarded on the taxation was not a debt, and could not be a subject of set off.

Wightman J. directed a verdict for the plaintiff, damages 10*l.* 17*s.* 2*d.*, the amount proved to be due if the Statute of Limitations did not attach and the set off was not admissible; giving leave to move to enter a verdict for the defendant, or that the damages might be reduced to 13*s.* *Watson*, in *Easter* term, 1845, obtained a rule nisi accordingly. In this term (*b*),

(*a*) *Eland* was tenant to *Broadley* on the *Laxton* estate.

(*b*) *November* 4th. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

Knowles and *Cowling* shewed cause. First: The item of *January* 20th, 1838, in the bill delivered to the defendant, drew after it the previous items relating to the mortgage, and barred the Statute of Limitations as to all. The plaintiff could not have brought an action in respect of this business till the whole was done. He was employed to procure means of paying off the mortgagee *Duesbery;* and if he failed in one quarter he was to attempt another. It cannot be contended that, while this was in progress, he could have stopped and commenced an action for each step he took. *Rothery* v. *Munnings* (*a*), which may be cited, was a very different case. There the business had been conducted by the proctor up to sentence; and the item subsequent to that was merely casual. [*Erle* J. Here it does not appear that the defendant at any time employed *Campbell & Phillips* in a continuous endeavour to raise money. On *January* 3rd, when *Hutton* and others have declined to advance it, they write "requesting to be informed of" his "wishes relative to the transfer."]

Next, the order for taxing *Campbell & Phillips*'s bill to *Bower* was made without jurisdiction. Under stat. 2 *G.* 2. *c.* 23. *s.* 23., the taxation was to be ordered "upon application of the party or parties chargeable by such bill;" the taxation here was applied for while that statute was in force: *Bower* was primarily chargeable; but the taxation was at the instance of *Broadley.* He was neither client to *Campbell & Phillips*, nor a party to the ejectment. It was not till the passing of stat. 6 & 7 *Vict. c.* 73. that a party liable to pay the bill, though not originally chargeable, was empowered (by sect. 38) "to

(*a*) 1 *B. & Ad.* 15.

make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make." That the Courts have no authority independent of statute to order a taxation, appears conclusively from *Doe dem. Palmer* v. *Roe* (*a*), and *Langford* v. *Nott* (*b*) there cited. In the former case notice was taken of some decisions which, apparently, are to an opposite effect; but in one of these, *Sadler* v. *Palfreyman* (*c*), there was a clear consent of all parties before the bill had been paid; and others, as *Balme* v. *Paver* (*d*), may in like manner be explained by their own circumstances. The proper course of proceeding here would have been that taken in *Doe dem. Capps* v. *Capps* (*e*): the mortgagor should have appeared as defending the ejectment, and then applied to have proceedings stayed, and the mortgage discharged, under stat. 7 *G.* 2. *c.* 20., on payment of the mortgage money and costs, which would have been taxed as between party and party. Here the defendant permits *Campbell & Phillips* to receive from their own client, the mortgagee, their costs as between attorney and client, to which they are entitled as against him, and then, after a long interval, applies for a taxation of their bill, and an order upon them to refund money paid, not to them, but to their client. The Court had no power, under the circumstances, to make that order.

Lastly, even if the order had been regular, the sum to be refunded was not a debt which could be set off. It was only by a late statute (1 & 2 *Vict. c.* 110. *s.* 18.) that a rule of Court directing payment of money ac-

(*a*) 4 *Dowl. P. C.* 95.
(*b*) 1 *Jac. & W.* 291
(*c*) 1 *A. & E.* 717.
(*d*) *Jac.* 305.
(*e*) 3 *New Ca.* 768.

quired the force of a judgment. *Gower* v. *Popkin* (*a*) shews that the order for taxation does not supersede the general rule that money voluntarily paid cannot be recovered back in an action, or be made a subject of set off; which latter proposition is exemplified by *Lawes* v. *Eastmure* (*b*). And in *Field* v. *Bezant* (*c*), where an attorney set off the amount of his bill, this Court held that the set off could not be reduced by costs of taxation which had been allowed to the plaintiff, because those costs could not have been recovered in an action, the remedy being by attachment. The taxation of this bill made out by *Campbell & Phillips* to their own client evidently could not create a contract between them and the now defendant. It is true that they attended the taxation: but this no more amounts to a consent that the sum allowed shall be claimable from them as a debt than proving under a commission of bankrupt estops a creditor from disputing the bankruptcy. It may be argued that the payment here was not voluntary, because the party made it in order to recover his title-deeds: but the facts do not amount to a duress; and there was no protest or complaint.

Watson and *Hugh Hill*, contrà. As to the first point; the rule is that, at any moment when the attorney might decline proceeding farther with the client's business until his bill is paid, the Statute of Limitations begins to run: *Rothery* v. *Munnings* (*d*). Here the attorneys might have so declined, six years before the action commenced. Lord *Lyndhurst* C. B. said, in *Harris* v.

(*a*) 2 *Stark. N. P. C.* 85.
(*b*) 8 *Car. & P.* 205.
(*c*) 5 *B. & Ad.* 357.
(*d*) 1 *B. & Ad.* 15.

Osbourn (*a*): "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. I do not mean to say, that, under no circumstances, can he put an end to this contract; but it cannot be put an end to without notice;" and this rule, as a general one, was recognized in *Nicholls* v. *Wilson* (*b*). The evidence here shews no contract on the part of *Campbell & Phillips*, continuing from *January* 3d to *January* 20th, 1848. When *Hutton* had declined lending, they were not obliged by any retainer to make applications in other quarters; and, after any such application, they might have laid the business aside. It is suggested that the letter of *January* 20th connects itself with that of *January* 3d, so as to draw that and the previous items into the six years. But the letter of *January* 3d was only a request generally to be informed of the defendant's wishes as to the mortgage, after *Hutton*'s refusal; which shews, at least, that the defendant had given no general direction to proceed; and the subsequent items of the bill relate to a variety of transactions. [*Coleridge* J. The question seems to be entirely of fact, what the agreement of *Campbell & Phillips* was. *Erle* J. The bill appears to tell its own story, that there was no continuous employment.]

Secondly, the bills delivered to *Broadley* and to *Bower* by *Campbell & Phillips* shew by the items that they acted in the mortgage transaction for mortgagor as well as mortgagee. (They pointed out entries tending to this conclusion of fact.) The taxation, therefore, was

(*a*) 2 *Cro. & M.* 629.; *S. C.* 4 *Tyr.* 445.
(*b*) 11 *M. & W.* 106.

regular And *Campbell & Phillips* not only attended it, but sought a benefit under it by making a new charge, which was allowed. If *Doe dem. Palmer* v. *Roe* (*a*) was rightly decided, and if *Campbell & Phillips* were not precluded by their implied assent from taking this objection, still it ought to have been taken within a reasonable time and by a direct application to set the taxation aside. But the proceeding, with knowledge of the objection, bars all subsequent recourse to it; as when the time for making an award has expired and the parties, knowing the fact, have still attended the arbitrator.

Thirdly, the sum overpaid may be recovered back as money had and received. The parties, agreeing to go before the Master, made him their judge; and his adjudication made the sum awarded a debt. It was adjudged to be money received by one party from the other, without right, in conscience, to retain it. An attachment might lie for it: but it does not follow that an action will not lie also, as in the case of an award. The opinion given in *Field* v. *Bezant* (*b*), which related to costs of taxation, rests on grounds that do not exist here. *Gower* v. *Popkin* (*c*) may be distinguished from the present case, inasmuch as the money, there, was paid after legal proceedings had been commenced to recover it. If the ruling there be correct, it does not apply where the plaintiff seeks to recover back money obtained from him by duress: and it was held in *Wakefield* v. *Newbon* (*d*) that, where a mortgagee's attorney, on reconveyance of the mortgaged property, had refused to let the mortgagor have his title deeds without payment

(*a*) 4 *Dowl. P. C.* 95.
(*b*) 5 *B. & Ad.* 357.
(*c*) 2 *Stark. N. P. C.* 85.
(*d*) 6 *Q. B.* 276.

of the attorney's bill of costs due from his own client, the sum obtained by that species of constraint might be recovered back as money had and received. [*Erle* J. There the deeds were withheld without any colour of right. Here is no pretence of duress; the mortgagee had a right to hold the deeds till his whole claim was satisfied.] But not, as was shewn, for the whole amount of 166*l.* 16*s.* 4*d.* [*Wightman* J. Might not *Broadley* have obtained a taxation under stat. 7 *G.* 2. *c.* 20.?] If the excess was paid in forgetfulness, it may be recovered as money had and received; *Kelly* v. *Solari* (*a*). Besides, the deeds may have been wanted for an immediate purpose, which would be defeated by waiting for a taxation.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the material issues, and the questions raised, his Lordship said:

As to the first point: it appeared by the plaintiff's bill that certain items, relating to a transfer of a mortgage, occurred more than six years ago, and other items relating to the same matter were within six years; and it was contended that the whole must be taken to be done under one contract, and that there was no cause of action in respect of any till all were complete. There was no evidence except the bill itself; and the language of that led to a different conclusion; therefore the items beyond the six years should be disallowed, and the verdict reduced to 7*l.*

(*a*) 9 *M.* & *W.* 54. See *Bell* v. *Gardiner*, 4 *M.* & *G.* 11.

As to the second point: it appeared that, in a mortgage transaction, the defendant, the mortgagor, had paid the bill due to the plaintiff from the mortgagee, and afterwards obtained a Judge's order against the plaintiff, without his consent, for referring this bill to taxation, and for refunding what, if anything, should be found to be overpaid. The Master made his allocatur for 10*l.* to be refunded. The question was, whether this was evidence to support a claim for money had and received; and we are of opinion it was not. A Judge's order without consent is no evidence of a promise, and will not support an action of contract: nor will the fact that the plaintiff, after the order was made, endeavoured to support his bill and to add some items amount to such evidence, as he acted under the compulsion of the Judge's order, and cannot be said to have acquiesced by reason of his endeavour to protect himself.

The rule, therefore, will be absolute to reduce the verdict to 7*l.*, and discharged as to the residue.

Rule accordingly.

Saturday, November 21st.

MAYBERY *against* MANSFIELD.

The sheriff cannot recover his charges for executing a fi. fa. by action against the attorney in the cause, unless there be special attorney to pay.

DEBT for fees, perquisites and sums of money due and of right payable from defendant to plaintiff as sheriff of the county of *Brecon*, upon and for the execution of certain writs and proceedings for defendant

circumstances from which a jury may infer an actual undertaking by the

at his request; and for the work and labour &c. of plaintiff and his bailiffs, officers and servants, done, performed and bestowed in and about the executing and serving of the said writs and proceedings, and in and about the conducting, guarding and keeping of the person arrested by plaintiff for defendant under and by virtue of the said writs and proceedings at the like request of defendant; and for money paid; and on an account stated. Plea, Never indebted. Issue thereon.

On the trial, before *Coltman* J., at the *Brecon* Summer assizes, 1845, it appeared that the action was brought by the sheriff against the defendant as attorney for the plaintiff in a cause in which a ca. sa. was executed, the charges being for warrant, caption fee, and conveying the defendant to gaol; in all 3*l.* 2*s.* 6*d.* The writ was sent to the undersheriff in the following letter.

"*Huxham* v. *Roberts*.

"Sir: Enclosed I send you a *non om. test. ca. sa.* herein, and shall be obliged by your informing me the result of the arrest. The defendant, I am informed, is now with the *Oullwyn* Company at the *Drim*, raising iron stone at one of their mine works. Yours &c. *C. B. Mansfield.*"

The defendant refused to pay the charges, when demanded of him, and wrote to the undersheriff as follows. "The reason of my client's not having paid same is that your officer allowed the defendant, after being arrested, to make his escape: and I have received instructions from him to take proceedings against the sheriff for such escape."

The plaintiff's counsel contended that the attorney was the person from whom the sheriff ought to require payment of his charges; and that, in this instance, the

attorney had assumed the character of an employer in his first letter to the sheriff. They also called witnesses to shew that, in the counties of *Brecknock*, *Carmarthen* and *Glamorgan*, the custom had long been that the sheriff looked to the attorney for payment of his charges, and was paid by him; and that the defendant must have known such custom, having himself been undersheriff. One witness stated that it had been much the practice in *Brecon* for the attorney to take upon himself the execution of the writ, and to indemnify the sheriff. The learned Judge was of opinion that the action was not borne out; and he directed a verdict for the defendant, reserving liberty to move that a verdict might be entered for the plaintiff; it being left to the Court to draw such conclusion as a jury might from the proof of custom.

E. V. Williams, in *Michaelmas* term, 1845, moved accordingly, and cited *Stanton* v. *Suliard* (*a*) and *Dew* v. *Parsons* (*b*). A rule nisi was granted.

Chilton now shewed cause. The argument for the plaintiff must ultimately be that every attorney suing out process of execution is liable to the sheriff as of right for his fees and expenses. The proof offered as to custom was quite inconclusive: and a general custom like that supposed is not likely to exist; for the practice is, almost universally, that the attorney himself employs the bailiff, and merely indemnifies the sheriff. Stat. 7 *W.* 4. & 1 *Vict. c.* 55. does not introduce any new regulation on this subject. No promise to pay the sheriff appears, either on the declaration or by the evidence: nor is such a promise recognised by the

(*a*) *Cro. Eliz.* 654.; *S. C., Moore*, 468., as *Suliard* v. *Stamp*, and 699., as *Stamton* v. *Suliard*.

(*b*) 2 *B. & Ald.* 562.

law; *Bilke* v. *Havelock* (*a*). That, as a general proposition, seems admitted in *Foster* v. *Blakelock* (*b*), though it was held there that an attorney, specially employing a bailiff to execute process, might bind himself by an express undertaking to remunerate him. [Lord *Denman* C. J. It seems to have been the assumption here that the practice in *Wales* was to appoint a special bailiff, and, therefore, that the employment of an officer by the sheriff at the attorney's instance must have been on the supposition that the attorney made himself liable as employing a special bailiff. The question for this Court appears to have been reserved on the notion of a special promise.]

Davison and *Willes*, contrà. The sheriff's right to a certain amount of remuneration is clearly recognized by stats. 29 *Eliz. c.* 4. and 7 *W.* 4. & 1 *Vict. c.* 55. (*c*): and in *Com. Dig. Viscount* (F 2.) it is laid down that he "may maintain assumpsit" for his fees. [*Wightman* J. "Upon a promise of payment."] It is added: "So, he may have debt." [Lord *Denman* C. J. Those passages may refer to actions on express contract.] The cases cited in support of the propositions have been examined; and no express contract appears (*d*). *Comyns*, under the head just referred to, states that the sheriff "cannot take a bond for his fees:" "nor, can he refuse to do execution till his fees paid." Independently of custom, from whom is he to look for payment? He knows nothing of the client; for the writ does not afford

(*a*) 3 *Campb.* 374. (*b*) 5 *B.* & *C.* 328.

(*c*) See also stat. 5 & 6 *Vict. c.* 98. *s.* 31.

(*d*) In *Bridge* v. *Cage*, *Cro. Ja.* 103., cited by *Comyns* (with reference to the action of assumpsit) as "contrà," the promise seems to have been express.

any sufficient information: the party with whom he deals is the attorney: and *Burrell* v. *Jones* (*a*) shews that an attorney, undertaking for a payment on behalf of an unknown client, makes himself personally responsible. [*Wightman* J. There the attorneys had entered into an express contract.] In *Dew* v. *Parsons* (*b*) the action, for charges on execution of process, was against the attorney; and no one suggested that it was therefore wrongly brought. [*Coleridge* J. There the defendant claimed a set-off against the sheriff for money overpaid on execution of other process, and therefore was interested in maintaining that the contract was between the sheriff and himself.] In *Foster* v. *Blakelock* (*c*) it was held that a bailiff might recover his fees in an action against the attorney who employed him. [Lord *Denman* C. J. There the employment was special.] The observation of *Abbott* C. J. applies here: "Of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause of whom he knows nothing." Here, too, the defendant, in his letter enclosing the writ, held himself out as the sheriff's employer. And the evidence of usage shewed that the parties dealt on that footing. [*Erle* J. There was proof that attorneys had paid the sheriff, but not that any who were unwilling had been obliged to do so.]

(The further argument as to the sufficiency of the evidence on this point is omitted).

Lord DENMAN C. J. There is nothing like evidence

(*a*) 3 *B.* & *Ald.* 47.
(*b*) 2 *B.* & *Ald.* 562.
(*c*) 5 *B.* & *C.* 328.

of a custom: and the plaintiff did not prove any of the circumstances which have been held to create a liability in the attorney.

COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Rule discharged.

TODD and BOSANQUET *against* STEWART, EMLY and HASTINGS.

DEBT. The declaration demanded 400*l.*, and alleged that the defendants were indebted to the plaintiffs in 200*l.* for goods sold and delivered, and 200*l.* on an account stated, which were unpaid, to plaintiffs' damage of 400*l.*

Debt for 400*l.*, viz. 200*l.* for goods sold and delivered, and 200*l* on an account stated. Pleas, as to the residue of the cause of action (after pleas as to 43*l.* 6*s.* 9*d.* parcel &c.): First, that plaintiff impleaded defendant in respect, among other

Pleas, by *Emly* and *Hastings*.

1. As to 43*l.* 6*s.* 9*d.*, parcel of the moneys in the declaration mentioned, that, after the accruing of the causes of action, and before action brought, viz. on &c.,

things, of the said residue, in assumpsit, to plaintiff's damage of 400*l.*, and such proceedings were had that plaintiff recovered against defendant 314*l.* 8*s.*, as well for his damages in the said action, and in respect whereof plaintiff had impleaded defendant, as for his costs and charges, whereof defendant was convicted, as by the record &c.; and which judgment has not been reversed. Secondly, as before, adding that defendant, before plaintiff had declared in the present action, paid and satisfied plaintiff the amount recovered, and plaintiff acknowledged himself to be satisfied the damages, costs and charges so recovered; as by the record &c. Replication, to each plea, that the said residue was not, nor was any part thereof, the causes of action in respect of which the judgment was recovered. Verdict on these issues for defendant.

Judgment, by the Court of Q. B., for the plaintiff, non obstante veredicto.

Held, by the Court of Exchequer Chamber, reversing the judgment in Q. B.: That the pleas were good after verdict, and defendant entitled to judgment.

That, assuming the pleas to mean that as to part of the claim in the first action plaintiff recovered, and as to the residue of such claim it was found no more was due, the objection that this should have been pleaded by way of estoppel was formal only, and could not be made after verdict.

But, assuming the meaning to be (and *semble* this was so) that plaintiff, having once had a judgment, could not have judgment again for the same debt, the pleas were substantially good.

And that, after the finding of the jury, the plaintiff could not contend that the part now claimed of the debt might have become due since the recovery in the first action.

Semble that, on special demurrer, the pleas would have been bad for not averring that the recovery, as well as the impleading, was in respect of the residue.

defendants and *Stewart* caused to be paid and satisfied to plaintiffs a certain amount &c., viz. 43*l.* 6*s.* 9*d.*, in full satisfaction &c. in respect of that sum, parcel &c.; and plaintiffs then accepted &c. Verification.

Replication to plea 1. That defendants and *Stewart* did not, nor did any or either &c., cause to be paid &c. in satisfaction &c. in manner &c. Conclusion to the country. Issue thereon.

Plea 2. As to the said 43*l.* 6*s.* 9*d.*, parcel &c., delivery by defendant *Stewart* and other persons, named, to plaintiffs (after the accruing &c. and before action brought), of a cheque drawn by *Stewart* and the last mentioned parties on certain bankers, named, requiring them to pay plaintiffs or bearer 43*l.* 6*s.* 9*d.*, which cheque was so delivered to plaintiffs, and was then accepted by them, for and on account and in respect of the said sum, and of all causes of action &c. Verification.

Replication to plea 2. That defendant *Stewart* and the other parties named did not, nor did any or either of them, deliver to plaintiffs the said draft &c. for or on account &c., in manner &c. Conclusion to the country. Issue thereon.

Plea 3. As to the residue of the cause of action in the declaration mentioned, that, heretofore, viz. on 3d *June*, 1840, in the Court of Exchequer, "the plaintiffs impleaded them the said last named defendants (*a*)" (*Emly* and *Hastings*) "upon, for and in respect of, amongst other things, the said residue of the said cause of action in the declaration mentioned, in an action on promises to the damage of the said plaintiffs of 400*l.*; and such pro-

(*a*) See *Todd* v. *Emly*; 7 *M. & W.* 427., 8 *M. & W.* 505., 9 *M. & W.* 606., and 11 *M. & W.* 1.

ceedings were thereupon had in the said last mentioned Court in that action that afterwards, to wit on the 7th day of *June* A. D. 1843 (*a*), the said plaintiffs, by the judgment and consideration of the last mentioned Court, recovered in the said action against them the said last named defendants 314*l.* 8*s.* as well for their damages in the said action, and in respect whereof the plaintiffs had impleaded the said last named defendants as aforesaid, as for their costs" &c. "about their said suit" &c., "whereof the said last named defendants were convicted: As by the record and proceedings thereof still remaining in the said last mentioned Court fully appears: and which said judgment hath not been reversed or made void: and this" &c.: offer to verify by the record.

Replication to plea 3. That the said residue of the said cause of action in the said declaration mentioned were not, nor was any part thereof, the said causes of action in the said 3d plea mentioned, and for and in respect of which the said judgment in the said 3d plea mentioned was recovered, in manner &c. Conclusion to the country. Issue thereon.

Plea 4. And, for a further plea &c., as to the said residue &c., defendants *Emly* and *Hastings* say that plaintiffs ought not to maintain their action &c., because they say that &c.; the plea then went on in the same words as plea 3, as far as "were convicted;" and continued as follows: "And these defendants" (*Emly* and *Hastings*) "further say that, after the recovery of the said judgment, and after the commencement of this suit and before the said plaintiffs had declared herein, to wit on the 5th day of *July* A. D. 1843, they the said

(*a*) The date of judgment (as above) and number of the roll (54) were stated in the margin.

last named defendants paid and satisfied to the plaintiffs the amount so recovered as aforesaid, and that the said plaintiffs thereupon then, and before plaintiffs had declared in this suit, to wit on &c., acknowledged themselves to be satisfied the damages, costs and charges so recovered as aforesaid of record in the said Court, as by the record and proceedings thereof still remaining in the said last mentioned Court fully appears. And this" &c. Offer of verification by the record, as before.

Replication to plea 4. That the said residue of the said causes of action in the declaration mentioned were not, nor was any part thereof, the said causes of action in the said 4th plea mentioned and for and in respect of which the said judgment in the said 4th plea mentioned was recovered, in manner and form &c. Conclusion to the country. Issue thereon.

There were six other special pleas by *Emly* and *Hastings*, which it is unnecessary to set forth, and which all led to issues of fact.

The defendant *Stewart* pleaded: 1. Payment of 43*l.* 6*s.* 9*d.*, parcel &c. 2. As to the residue, recovery by plaintiffs of 314*l.* 8*s.* in an action against *Emly* and *Hastings*. 3. The same recovery against *Emly* and *Hastings*, and payment by them. These pleas were the same respectively, except the name of the party pleading, with the pleas 1, 3, and 4, of *Emly* and *Hastings*. *Stewart* also pleaded two other special pleas, which it is unnecessary to state, and which led to issues of fact.

The plaintiffs replied to pleas 1, 2 and 3, respectively, in precisely the same form (mutatis mutandis) as to pleas 1, 3 and 4 of the other defendants: and issues were joined accordingly.

On the trial, before *Coleridge* J., at the *Bristol* Summer assizes, 1845, a verdict was found, as to *Emly* and *Hastings*, for the defendants on the 1st, 2d, 3d, and 4th issues, and, on the other issues, for the plaintiffs: and, as to *Stewart*, for the defendant on the 1st, 2d, and 3d issues, and for the plaintiffs on the rest (*a*).

(*a*) The verdict was in fact taken, at the trial, for the plaintiffs also on the issues on the third and fourth pleas of *Emly* and *Hastings*, and the second and third pleas of *Stewart*, under the following circumstances.

It appeared that the present plaintiffs had brought an action of assumpsit in the Court of Exchequer against *Emly* and *Hastings*, and had recovered therein 1*s.* damages and 314*l.* 7*s.* costs; and that the whole 314*l.* 8*s.* had been paid to the plaintiffs before declaration in the present action. To identify the causes of action, the particulars of demand in each were produced. The particulars in the action in the Exchequer stated that the action was "brought to recover 194*l.*, being the balance due from the defendants to the plaintiffs upon the following items of account." The particulars in the present action (which were delivered in obedience to an order of *Wightman* J. for fuller particulars) commenced with the items, at the end of which was added: "Above are the full particulars of the plaintiffs' demand, with dates and items, delivered in pursuance of of the order" &c. The first six items of the particulars in the present action, amounting to 43*l.* 6*s.* 9*d.* (covered by the plea of payment), did not appear in the particulars in the action in the Exchequer. All the other items of the particulars in the present action were included in those in the action in the Exchequer, except that, instead of an item "to six bottles superior sparkling Champagne at 90*s.*, 2*l.* 5*s.*" in the last mentioned particulars, there appeared in the particulars in the present action, at the same date, "half dozen red Burgundy, 2*l.* 5*s.*" It was proved that six bottles of red Burgundy had been delivered on that day, but no Champagne. The particulars in the action in the Exchequer contained also items, to the amount of 56*l.* 15*s.*, of a later date than any items of the particulars in the present action: so that the total of the particulars in the Exchequer action was 352*l.* 12*s.*, and that of the particulars in the present action 339*l.* 3*s.* 9*d.*

The counsel for the plaintiffs objected that the former action appeared to be brought for a balance only, and this for the whole amount: but, in answer, it was shewn that the original particulars in this action had claimed only 180*l.* with interest; and it was argued that the fuller particulars after delivered must be taken as an explanation of the first particulars. The counsel for the plaintiffs insisted also on the discrepancy as to the charges for Champagne and Burgundy. It was agreed that a

Rawlinson, in *Trinity* term 1844, obtained a rule nisi to enter judgment for the plaintiffs, notwithstanding the verdict on the issues on the 3rd and 4th pleas of *Emly* and *Hastings*. In *Michaelmas* term (*b*), 1844,

Crowder and *Butt* shewed cause, and *Rawlinson* and *Peacock* were heard in support of the rule. The course

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verdict should be taken for the plaintiffs on the issues on the third and fourth pleas of *Emly* and *Hastings*, and the second and third pleas of *Stewart*, and that leave should be reserved to move to enter the verdict on these issues for the defendants; and that the Court should decide on the effect of the evidence. Accordingly,

In *Michaelmas* term, 1843, *Crowder*, on behalf of *Emly* and *Hastings*, obtained a rule nisi to enter the verdict on these issues for the defendants. *Phinn*, in the same term, obtained a rule nisi to enter a verdict for *Stewart* on his second and third pleas. In *Trinity* term (*June* 5th), 1844, *Rawlinson* and *Peacock* shewed cause, and relied upon the points taken for the plaintiffs at the trial, and contended, further, that a verdict and judgment for nominal damages could afford no answer to a claim for 400*l*. They cited *Seddon* v. *Tutop* (6 *T. R.* 607.), *Hitchin* v. *Campbell* (2 *W. Bl.* 827.; *S. C.* 3 *Wils.* 240, 304.), *Lord Bagot* v. *Williams* (3 *B. & C.* 235.), *Hadley* v. *Green* (2 *C. & J.* 374.; *S. C.* 2 *Tyrwh.* 390), *Godson* v. *Smith* (2 *B. Moore*, 157.), *Ravee* v. *Farmer* (4 *T. R.* 146.), *Thorpe* v. *Cooper* (5 *Bing.* 116.), *Lacon* v. *Barnard* (*Cro. Car.* 35.), *Green* v. *Marsh* (5 *Dowl. P. C.* 669.), *Tuck* v. *Tuck* (5 *M. & W.* 109.), *Moore* v. *Butlin* (7 *A. & E.* 595.), *Russell* v. *Bell* (10 *M. & W.* 340.), *Meager* v. *Smith* (4 *B. & Ad* 673.; see *Kingham* v. *Robins*, 5 *M. & W.* 94. 99.), *Longridge* v. *Brewer* (1 *Bing.* 143, 307.; *S. C.* 7 *B. Moore*, 522.), *Stafford* v. *Clark* (2 *Bing.* 377.), *Markham* v. *Middleton* (2 *Str.* 1259.), *Bowden* v. *Horne* (7 *Bing.* 716.), *Dunn* v. *Murray* (9 *B. & C.* 780.).

Crowder and *Butt*, and *Phinn*, contrà, were stopped by the Court.

Per Curiam (Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.). There really is nothing whatever in the points made for the plaintiffs. The rule must be made absolute.

Rules absolute.

Afterwards *Rawlinson* obtained the rule Nisi mentioned in the text.

(*a*) *November* 18th. Before Lord *Denman* C. J., *Williams*, *Coleridge* and *Wightman* Js.

of argument will sufficiently appear by the judgment in this Court, and by the arguments and judgment in the Court of Exchequer Chamber (post, p. 767.). The following authorities, not mentioned there, were referred to in the argument in this Court. *Avery* v. *Hoole* (*a*), *Bradley* v. *Milnes* (*b*), *Markham* v. *Middleton* (*c*), *Bowden* v. *Horne* (*d*), 2 *Phil. Ev.* 13. (9th ed.), *Heming* v. *Wilton* (*e*), Note (1) to *Earl of Manchester* v. *Vale* (*f*), *Hopkinson* v. *Tahourdin* (*g*), *Com. Dig. Estoppel* (A 1.), *Pinnel's Case* (*h*), *Thomas* v. *Heathorn* (*i*).

Cur. adv. vult.

Lord DENMAN C. J., in *Hilary* term (*January* 31st) 1845, delivered the judgment of the Court.

This was an application by the plaintiffs for leave to enter judgment for them notwithstanding a verdict for the defendants on one of the pleas pleaded by them. The declaration was *in debt*, and contained two counts. The first stated the defendants to be indebted in 200*l.* for goods sold; and the second stated the defendants to be indebted in 200*l.* upon an account stated: the sum demanded in the commencement of the declaration was 400*l.*; and the damages were laid at 400*l.* To this the defendants pleaded: 1. *As to* 43*l.* 6*s.* 9*d.*, parcel of the moneys *in the declaration* mentioned, payment of that sum generally; 2. *As to the same sum of* 43*l.* 6*s.* 9*d.*, a discharge by delivery and acceptance of a cheque to

(*a*) 2 *Cowp.* 825.
(*b*) 1 *New Ca.* 644.
(*c*) 2 *Str.* 1259.
(*d*) 7 *Bing.* 716.
(*e*) 5 *C. & P.* 54.
(*f*) 1 *Wms. Saund.* 28.
(*g*) 2 *Chitt. Rep.* 303.
(*h*) 5 *Rep.* 117 *a.*
(*i*) 2 *B. & C.* 477.

that amount; 3. As to the residue of the cause of action in the declaration mentioned, a former recovery of 314*l.* by the plaintiffs in an action against the defendants upon and for, amongst other things, the said residue of the cause of action in the declaration mentioned. The defendants obtained a verdict upon the issue upon the third plea: and it was notwithstanding the verdict upon that issue that the plaintiffs moved for judgment. Several points were made upon the argument, to which we do not think it necessary to refer, as there was one upon which the plaintiffs are, we think, clearly entitled to our judgment. The third plea professes to be an answer as to the whole of the residue of the cause of action in the declaration, whereas it is but an answer to a part.

The declaration is for 400*l.* The defendants plead generally and specially, in their first and second pleas, payment of 43*l.* 6*s.* 9*d.*, parcel of the 400*l.* demanded, leaving the sum of 356*l.* 13*s.* 3*d.* as the residue. The defendants do not deny that they were indebted to the plaintiffs in that residue or in any part of it; but, admitting that they were indebted in that amount, plead by way of avoidance that the plaintiffs recovered 314*l.* in a former action in respect of that residue; leaving the difference between 356*l.* 13*s.* 3*d.* and 314*l.* wholly unanswered and unaccounted for. The cases of *Down* v. *Hatcher* (*a*), *Few* v. *Backhouse* (*b*), and some others, were cited, but require no remark but that they are in accordance with the view we take of the case, that the plaintiffs are entitled to judgment, as the third plea, though found for the defendants, was no sufficient answer to that which it professed to answer.

Rule absolute.

(*a*) 10 *A. & E.* 121.

(*b*) 8 *A. & E.* 789.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

STEWART, EMLY and HASTINGS *against* TODD and BOSANQUET.

JUDGMENT for the plaintiffs, non obstante veredicto, was signed on the 3rd and 4th issues as to *Emly* and *Hastings*, and the like judgment on the 2nd and 3rd issues as to *Stewart*. Error was brought in the Exchequer Chamber, the causes specially assigned being that the pleas of the defendants respectively, on which the said issues were taken, were good in law, and that the plaintiffs ought not to have recovered against them, nor ought judgment to have been given for the plaintiffs non obstante veredicto. Joinder. The writ of error was argued in last *Easter* vacation (*a*).

For marginal note see p. 759, antè.

Butt, for the plaintiffs in error, defendants below. Recovery of a smaller sum when a larger was in litigation is a good answer to a subsequent demand of the larger sum. The plea of judgment recovered differs in this respect from a plea of accord and satisfaction. "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because

(*a*) *May* 9th, 1846: before *Tindal* C. J., *Maule*, *Cresswell* and *Erle* Js., and *Parke*, *Rolfe* and *Platt* Bs. *May* 11th: before *Tindal* C. J., *Coltman* and *Maule* Js., and *Alderson*, *Rolfe* and *Platt* Bs.

it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher:" *King* v. *Hoare* (*a*), judgment of the Court. The present case, therefore, is not governed by *Fitch* v. *Sutton* (*b*) and *Down* v. *Hatcher* (*c*), where the defence was payment and acceptance in satisfaction. The identity of the causes of action here is affirmed by the verdict. It would follow from the doctrine laid down by the Court of Queen's Bench, that, if a plaintiff brought an action for 400*l.* and recovered only 399*l.*, he might sue again for the 1*l.* The residue of the amount claimed here is covered, in each instance, by the plea of a former judgment; for that residue was under litigation: if at that time the defendant had had a verdict and judgment as to the whole, it would have been an answer to all future demands as to any part: so, a judgment for less than the amount then claimed is an answer as to the excess.

Peacock, contrà. The pleas are clearly imperfect; the question is, whether they are good after verdict. Each of them must be taken to admit that the whole amount (except the 43*l.* 6*s.* 9*d.* covered by the preceding pleas) was once due; *Green* v. *Marsh* (*d*), *Cousins* v. *Paddon* (*e*). [*Maule* J. But then the defendants say

(*a*) 13 *M. & W.* 494. 504.
(*b*) 5 *East*, 230.
(*c*) 10 *A. & E.* 121.
(*d*) 5 *Dowl. P. C.* 669.
(*e*) 2 *Cro. M. & R.* 547.; *S. C.* 5 *Tyr.* 535.

"we had a law suit and you recovered something." *Tindal* C. J. If it was only a farthing, has not the simple contract merged in the res judicata?] A judgment recovered, if it be for the whole sum, operates by way of merger; if for less, then, as to the residue, by way of estoppel; but the estoppel should be formally pleaded; *Co. Litt.* 303 *b.* [*Parke* B. The only question now is, whether or not the plea is good after verdict. *Maule* J. In extreme strictness a recovery in assumpsit would not be an answer in debt, because damages, and not the debt, are recovered. But it is an answer; and you do not seem to dispute that.] The defendants should have pleaded, as was done in *Seddon* v. *Tutop* (*a*), a "recovery" "for the damages the plaintiffs had sustained as well by means of not performing the same identical promises" as for his costs. The plaintiffs might then have put that precise fact in issue. It is consistent with the present pleadings that the plaintiffs, on the former occasion, may have impleaded the defendants for goods sold and delivered and on an account stated, but have given evidence in support of one demand only, not being that now in question. [*Maule* J. If that was so, you might have replied it to the pleas as now pleaded. *Parke* B. It would have been matter of evidence whether the demand now set up was proceeded upon in the former action or not; *Lord Bagot* v. *Williams* (*b*). In *Seddon* v. *Tutop* (*a*) the plaintiff proved that the demand then made was not brought forward on the previous execution of a writ of inquiry. That case is against you, so far. *Cresswell* J. mentioned *Dunn* v. *Murray* (*c*). *Maule* J. You do not deny that the present defence would be good by

(*a*) 6 *T. R.* 607.
(*b*) 3 *B. & C.* 235.
(*c*) 9 *B. & C.* 780.

way of estoppel.] It would, if so pleaded. [*Maule* J. After judgment, can you say that a mere difference in the form of praying judgment is essential?] It appears here on the face of the plea that the plaintiff on the former occasion did not recover the whole amount which is admitted to have been once due. [*Erle* J. Why may not the demand have been reduced by a set-off? The contrary cannot be inferred from the record.] The recovery of a particular amount for damages and costs in an action of assumpsit cannot be always conclusive in an action of debt. The plea here avers that the plaintiffs impleaded the defendants in respect of the residue of the present cause of action; but it does not state that the whole of such residue of a cause of action had then accrued. The plaintiffs may have failed as to part because the debt was incurred on a credit which had not then expired; and then they would be entitled to recover that part in a subsequent action. [*Maule* J. The omission you point at would have been ground of special demurrer.] In *Milles* v. *Milles* (*a*) the action was on promise to pay 20*l.* by instalments of 10*l.*: on default in paying the first instalment, the plaintiff sued, and recovered 20*l.*: and the Court held that in assumpsit the plaintiff might recover this sum as damages for nonpayment of the first 10*l.*, though no action would as yet lie for the second. That recovery would have been no answer to an action for the second 10*l.* [*Parke* B. The causes of action would not have been the same.] In note (4) to *Veale* v. *Warner* (*b*), where reference is made to *Co. Litt.* 303 *b.* as an authority for the doctrine that a plea raising mat-

(*a*) *Cro. Car.* 241.

(*b*) 1 *Wms. Saund.* 325 *a.*

ter of estoppel should, at the conclusion, rely on the estoppel, it is said to be "not merely matter of form to conclude an estoppel with relying upon it. For by not doing so the party may often lose that advantage of the estoppel which the law gives him:" and *Speake* v. *Richards* (*a*) is cited. The finding of the jury in the former action, not being so relied on, does not get rid of the objection that the judgment was recovered for a sum smaller than that now confessed. Suppose in an action of debt the defendant had waged his law, and had succeeded, and afterwards another action were brought for the debt: he might plead, by way of estoppel, judgment on the wager of law; but, if he confessed the debt, and merely pleaded the judgment on the wager of law by way of avoidance in the common form, he would fail. In *Vooght* v. *Winch* (*b*) *Bayley* J. said that a former judgment "decides nothing unless by way of estoppel." [*Maule* J. An ordinary plea in bar need not begin by an express confession. Does not a plea in estoppel confess more than an ordinary plea?] In *Stephen on Pleading*, 250 (5th ed.), it is said that pleadings in estoppel "are pleadings, which, without confessing or denying the matter in fact, adversely alleged, rely merely on some matter of estoppel as a ground for excluding the opposite party from the allegation of the fact." They pray if the plaintiff shall be admitted to say that defendant was indebted &c.; as in *Palmer* v. *Temple* (*c*). "Every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference;" *Co. Litt.* 352 *b.*: and, in the same place, it is said:

(*a*) *Hob.* 206. 207. 5th ed.
(*b*) 2 *B. & Ald.* 662. 670.
(*c*) 9 *A. & E.* 508.

"where the verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth." The question therefore is, whether a recovery of a judgment for 1*s.* may be made a satisfaction of an admitted debt of 400*l.* by a general averment of identity of the cause of action. A judgment in an action in one form, as trover, might constitute an answer to an action in another form, as debt; but then the special facts which identify the two should appear on record. In *Lacon* v. *Barnard* (*a*) the plaintiff brought trover for 100 sheep, and the defendant pleaded that plaintiff had sued defendant and *S.* for taking and driving away one hundred sheep, to which they had pleaded Not guilty as to eleven, and a justification as to eighty nine, on which plaintiff had taken issue, had a verdict, and recovered 2*d.* damages; and the plea averred that the taking and driving were all one with the conversion now sued upon, and that the judgment was yet in force: and the plaintiff replied that the 2*d.* was not assessed for the value and the conversion of the sheep, and the taking and driving was not the same trespass, quoad the conversion: and, upon demurrer to the replication, the plaintiff had judgment, by three Judges against one. Here the recovery pleaded is only of damages for a breach of promise. Suppose the former action had been in debt, and the recovery had been only of a shilling damages for the detention. [*Tindal* C. J. Would that be a good judgment?] The debt might have been paid after action brought. [*Maule* J. Your argument would be as strong if the damages had been 400*l.*] In *Ashbrooke* v. *Snape* (*b*) all the

(*a*) *Cro. Car.* 35. See *Holmes* v. *Wilson*, 10 *A. & E.* 503.
(*b*) *Cro. Eliz.* 240.

Judges agreed that, if a man bound by obligation promise to pay the money, assumpsit lies; "and if he recover all in damages, this shall be a bar in debt upon the obligation." Here all is not recovered. [*Parke* B. Suppose a former judgment were pleaded, not by way of estoppel, and that it was found that nothing was due.] That would be no answer. *Down* v. *Hatcher* (*a*) is a clear affirmance of the principle that a plea which confesses a claim to a certain amount, and sets up satisfaction only by payment of a less amount, is bad. In *Beckwith* v. *Nott* (*b*) it was said: "It is at the discretion of the jury, whether they will find the entire sum in damages, or only so much as is due. But when they give the entire damages, as here, *Doderidge* said, that it is with an averment that it is given for the entire sum; and it shall be a good bar in a new action on the case upon that promise." Now here the first judgment appears not to be given for all which is admitted to be due. [*Maule* J. You admit that the judgment might be pleaded as an answer by way of estoppel: do you recollect any instance of a plea setting up, by way of estoppel, a judgment in favour of the plaintiff?] There may be none such: where the judgments are for the same sum, the judgment may always be pleaded in bar. But there is no precedent of a plea of judgment recovered by the plaintiff for a smaller sum. An assessment of damages for not performing a contract cannot operate as an extinguishment of a debt. [*Maule* J. May it not extinguish the right to complain?] It is not so pleaded here. [*Maule* J. Suppose a cognovit for half the amount: might not

(*a*) 10 *A. & E.* 121. (*b*) *Cro. Jac.* 504. (4th. ed.)

that be full satisfaction?] Not if the full amount were liquidated, as here, by the admission. [*Tindal* C. J. It would give a remedy against the land.] It might therefore, perhaps, be formally pleaded as accord and satisfaction: but that is not done here. [*Platt* B. You say that the judgment can be used only as judgment against the plaintiff for all not recovered; and that this should be put as an estoppel.] That is the effect of the argument. Suppose detinue were brought for two cows and two horses, and judgment were recovered for the two cows: would that be pleadable in bar in an action of trover for the two horses? It could not be shewn by way of confession and avoidance, though possibly it might by way of estoppel. If, in the first action, there had been a plea denying the plaintiff's property in the horses, and a verdict on that for the defendant, such a verdict might have been pleaded as an estoppel, but not by way of confession and avoidance.

Butt, in reply. The defence is properly pleaded, because it was necessary to aver identity of causes of action, which averment is traversable: and this was the form in *King* v. *Hoare* (*a*) and *Lord Bagot* v. *Williams* (*b*). "If the whole rights and merits of the case have been discussed and determined in one action, the judgment in it may be pleaded in bar to the other;" note (1) to *Wilbraham* v. *Snow* (*c*). In *Lacon* v. *Barnard* (*d*) the record shewed that the first recovery was not in respect of the subject matter of the second action. The authorities cited to shew that an estoppel cannot be

(*a*) 13 *M. & W.* 494.
(*b*) 3 *B. & C.* 235.
(*c*) 2 *Wms. Saund.* 47 *bb, cc.*
(*d*) *Cro. Car.* 35.

relied on unless formally pleaded are inapplicable: the defence here is that the debt is merged in the judgment.

Cur. adv. vult.

PARKE B., in this term (*November* 11th), delivered the judgment of the Court.

The question in this case arises on a writ of error from a judgment of the Court of Queen's Bench non obstante veredicto, on a plea in an action of debt on simple contract for 400*l.* As to 43*l.* 6*s.* 9*d.*, there was a plea of payment; as to the residue, 356*l.* 13*s.* 3*d.*, a plea &c. (His Lordship here read the 3d plea). There was a replication to this plea, that the residue of the causes of action in the declaration mentioned were not the causes of action in the third plea mentioned, in respect of which the judgment was recovered: and on this issue the jury found for the defendants, that the residue of the causes of action in the declaration mentioned were the residue of the causes of action in the said plea mentioned, and for *and in respect of which the judgment was recovered.* There was another similar plea, stating the payment of the sum recovered, with a similar replication, and a verdict thereon for the defendants; and several pleas, the issues on which were found for the plaintiffs. On a motion for judgment non obstante veredicto, the Court of Queen's Bench thought the plea was not a good answer to the part of the declaration to which it was pleaded, because, a debt certain to the amount of 356*l.* 13*s.* 3*d.* being admitted, the difference between that sum and the amount for which judgment was recovered, viz. 314*l.* 8*s.*, was wholly unanswered.

It is to be observed that the plea is not in the ordinary

form of a plea of judgment recovered, which states that the plaintiff impleaded the defendant for the same causes of action in the declaration mentioned, and such proceedings were thereupon had in that plea that afterwards the plaintiff recovered so much for *the same causes of action in the declaration mentioned* and for his costs. This plea to the residue states the impleading for the residue of the same causes of action, and that such proceedings were had that the plaintiffs recovered in the said action 314*l.* 8*s.*, as well for *their damages in the said action, and in respect whereof* the plaintiffs had impleaded the defendants, as for their costs; but the plea does not plainly and directly aver that the recovery was for the *residue of the same causes of action:* and it would probably have been bad, on special demurrer, for the want of such positive averment. If the plaintiffs had recovered 1*s.* in the former action *for part* of the cause of action, and had entered a nolle prosequi for the remainder, and recovered 314*l.* 7*s.* for costs, it is clear the recovery would have been no bar for the whole; and yet it might be said in such case that the plaintiff had by judgment of the Court recovered a sum of 314*l.* 8*s.* as well for *his damages in the said action,* and in respect whereof the said action had been brought, as for his costs, though it would have been the correct course to have said in such a case that he recovered *for part of* the damages in respect whereof the action had been brought, the nolle prosequi having the effect of withdrawing the part as to which it is entered from being a subject of dispute in the suit. But, after pleading over, the plea must be understood in the sense which would make it a good answer to the declaration, and must be taken to mean that the plaintiffs had a

judgment of the Court in respect of *all* the damages which they sued for, that is, the same causes of action as constituted the residue of the causes of action; and so the jury have found on the issue on this plea. Upon this state of the record, the plea must be taken to be the same as the ordinary plea of judgment recovered.

On the argument before us it was contended, on the part of the plaintiffs in error, that this judgment was erroneous, as it proceeded upon a mistaken analogy between payment of a lesser sum in satisfaction of a greater and recovery by judgment of a lesser sum in an action for a greater; which recovery it was contended was binding and conclusive, and prevented the same cause of action being litigated again. On the part of the defendants in error, it was contended that the judgment was right, for the plea was bad, and no answer to the whole debt, the existence of which at one time as a debt certain it admitted: that a judgment recovered was a bar, on the principle of merger in the superior remedy, only with respect to the part recovered, and that, as to the residue which had been litigated and not recovered, it was an answer on the ground that so much of the debt was not due, and that the plaintiffs were estopped from saying that such residue was due; and that, as the plea did not in express terms rely on the estoppel in this case, the plea was bad in substance.

Supposing this argument to be well founded, and that the true meaning of the plea is that as to part the plaintiffs recovered, and as to the residue it was found that no more was due, the omission to plead the latter part of the judgment, which was in effect a judgment for the defendants as to that part, by way

of estoppel, was mere matter of form, and could only be taken advantage of on special demurrer. The plea was a perfectly good answer in substance as to that part, as a plea amounting to the general issue would have been, though it was pleaded by way of confession and avoidance. It is not, however, to be understood that we consider this to be the true construction of the plea of judgment recovered, where the amount is less than that claimed in the subsequent action. If it be so, the answer is good in substance: but, if the true meaning is, as there is good ground to contend that it is, that the plaintiffs, having once sued in indebitatus assumpsit for the very same debt now claimed in an action of debt, and having had the amount assessed by the jury and adjudicated on by the Court, have had all the benefit which could be given by a judgment, and cannot again sue for the same debt, then unquestionably the plea is good in substance. It is, however, unnecessary to decide the point, on which ground the plea is good, in the present action.

It was then argued by Mr. *Peacock* that the plea was bad, because it did not appear that the former recovery may not have been for less by reason of part of the debt not being due at that time, but that it is now due. The answer is, that the jury have found the former recovery to have been for the *same* causes of action, and consequently that the question in this suit is the same as in that: viz. whether, at the date of the former writ, the defendants were or were not indebted to the plaintiffs.

This objection, therefore, cannot prevail: and we are all of opinion that the plea is good in substance: and therefore the judgment non obstante veredicto erroneous.

And consequently the judgment for the plaintiff must be reversed (*a*).

Judgment reversed.

(*a*) *Parke* B. added that this judgment of the Court was prepared in the time of the late Chief Justice.

MARY MARSHALL *against* GEORGE POWELL and SEPTIMUS POWELL.

Saturday, November 21st.

ASSUMPSIT. The first count was on a promissory note, made by defendants on 2nd *April* 1844, payable to plaintiff, her executors, &c., on 1st *September*,

In assumpsit on a promissory note made by defendant and payable to plaintiff, de-

fendant, as to all but 3*l.* 5*s.*, pleaded that, to wit on 30th *March*, *C.* being then tenant to *M.* of a farm, and having arranged to transfer it to defendants, and being, jointly with plaintiff, entitled to the farming stock and growing crops, it was agreed, by plaintiff and *C.* of one part, and defendant of the other, that, in consideration &c., *C.* and plaintiff had sold, and thereby ratified, to defendants the possession of the farm, possession to be given on execution of the agreement: and, for the considerations aforesaid, and of such sum as should be found by valuers, after named, to be the value of the way-going crop of corn having been secured to be paid by defendants to *C.* and plaintiff on 1st *September* next, after deducting the rent which would become due to *M.* in *April*, *C.* and plaintiff thereby sold to defendants the way-going crop and tenant-right: and the parties nominated valuers, *T.* and *K.*: and it was agreed that the *April* rent should be deducted from the valuation, and the remainder secured to be paid to *C.* and plaintiff on 1st *September* next. Averment, that, to wit on 1st *April*, the parties further agreed that the valuation should be made immediately and the amount secured by a promissory note, but the valuation should be revised by the valuers, *to wit on* 1*st* August *then next*, and, if any alteration should be made, the parties should pay and receive the amount so to be ascertained. Averment that the valuers, to wit on 1st *April*, valued at 94*l.* 10*s.*, and the promissory note was given, payable 1st *September*, for the difference between that sum and the rent, and there was no other consideration for it. That afterwards, to *wit* 2*d* August, the valuers revised the valuation and reduced it to 56*l.* 15*s.*, whereby the difference between the rent and the valuation was reduced to 3*l.* 5*s.*, and the consideration for the note failed as to the residue. Replication: De injuriâ.

On the trial, it appeared that the words of the agreement of 1st *April* were: "that such valuation shall be revised and examined by the said valuers above named on the 1st day of *August* next." The crops were in fact viewed on 2d *August* only: the value was finally fixed on 12th *August*: but it was proved that the value had not altered between 1st and 2nd *August*.

Held, that the revision was not made in pursuance of the agreement, and that the plaintiff was entitled to a verdict on the issue.

To prove that plaintiff had assented to the revision on 2d *August*, defendant offered in evidence an unstamped memorandum, signed by plaintiff on 20th *August*, when defendant's attorney, with whom the note had been deposited, gave it up to plaintiff. The memorandum stated the amount of the first valuation, the balance after deducting the rent, and that this was secured by the note; and added: "this note is to be subject to the revised valuation of Messrs. *T.* and *K.*, and will be more or less than 41*l.* 0*s.* 8*d.* accordingly as they value the corn. *N. B.* The note was given up to me by *W.* this 20th *August*."

Held that this did not require a stamp, and ought to have been received as evidence.

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MARSHALL v. POWELL.

1844, for 41*l.* 0*s.* 8*d.*, with interest: breach, non-payment.

Plea: to first count, except as to 3*l.* 5*s.*, parcel of the sum mentioned in the promissory note: that heretofore, and before the making of the note, to wit on 30th *March* 1844, by a certain agreement in writing, bearing date a certain day, to wit the day and year aforesaid, and made between one *Charles Copley* and plaintiff of the one part, and the defendants of the other part, after reciting that *C. C.* was the tenant of a farm at *Colton* in the county of *York*, the property of one *William John Sawrey Morritt*, which *C. C.* was desirous of giving up and relinquishing, and that *C. C.* had accordingly entered into an arrangement with defendants for the transfer of the farm to them then immediately, on the terms and conditions thereinafter mentioned; and that *C. C.* and plaintiff were jointly, or *C. C.* alone was, entitled to the farming stock, &c., growing crops, tenant-right, ploughings, harrowings and tillage upon the farm; and that they had agreed with defendants for the sale thereof to them at the sum of 50*l.* paid down, and such valuation as was thereinafter mentioned: it was witnessed that, in consideration of the premises, and of 50*l.* to *C. C.* and plaintiff, or one of them, paid by defendants upon the signing of the said agreement, the receipt whereof &c. (acknowledgment), *C. C.* and plaintiff had sold and transferred, and did thereby ratify and confirm, unto defendants the peaceable and quiet possession of the farm and premises, and also all and singular the fixtures, tenant-right, matters and things mentioned in a certain schedule thereunder written, possession of the farm and premises being to be given

and taken upon the execution of the said agreement: and, for the considerations aforesaid, and also in consideration of such sum of money as should be found by the valuers thereinafter named to be the value of the way-going crop of corn upon the farm having been secured to be paid to *C. C.* and the plaintiff by defendants on 1st *September* then next ensuing, after deducting thereout the sum of 53*l.* 10*s.* which would become due on the 6th *April* then next &c., to the said *W. J. S. Morritt*, for the farm, and all rates, taxes and assessments in respect of the farm up to the said 6th *April*, they the said *C. C.* and plaintiff had agreed to sell and transfer unto defendants, and did thereby sell and transfer unto them, all the way-going crop of corn, wheat or other grain, and all other the tenant-right and interest in the farm, of them the said *C. C.* and plaintiff, and each or either of them; and *C. C.* and plaintiff did thereby agree to warrant and defend all the thereby bargained premises &c.; and defendants did thereby accept of the possession of the farm and all the thereby bargained premises, and did agree to pay for the same at the times and in manner therein before mentioned: And that, for the purpose of making a valuation of the said way-going crop and tenant-right, *C. C.* and plaintiff did nominate and appoint on their behalf one *Christopher Todd*, and defendants did nominate and appoint one *Thomas Kilby*, such two valuers to have power to name an umpire &c.; and the valuation of the said valuers or umpire it was thereby agreed by all parties should be binding and conclusive: And it was further agreed that the sum of 53*l.* 10*s.*, so due on 6th *April* next ensuing to

Morritt for rent, should be deducted out of the said valuation and paid by defendants on the execution of the agreement, or on demand, and the remainder thereof secured to the satisfaction of *C. C.* and plaintiff, and paid to them on 1st *September* then next &c. As by the said agreement &c.

That, after the making of the said agreement, and before the making of the promissory note, and before the commencement of this suit, to wit on 1st *April* 1844, it was further agreed by and between the said parties to the said agreement, by a certain memorandum in writing then added to the said agreement, in manner following, viz., that the said valuation of the crop of corn in the said agreement mentioned and agreed to be made by the said valuers should be made and perfected immediately, and the amount thereof secured by a joint promissory note; but that such valuation should be revised and examined by the said valuers thereinbefore named *afterwards, to wit on the* 1st *August then next ensuing;* and, if any alteration should be made therein, the said parties mutually undertook and agreed to abide by and fulfil the same in all respects whatsoever, and to pay and receive the amount thereof so to be ascertained: As by the said last mentioned memorandum &c.

That, immediately upon and after the making of the said agreement and of the said memorandum thereto added, and before the making of the promissory note, to wit on 1st *April* 1844, *T. Kilby* and *C. Todd*, so being such valuers appointed &c., made their valuation of the said way-going crop and tenant-right, under and in pursuance of the said agreement, and thereby then valued such crop and tenant-right at a certain large

sum of money, to wit 94*l.* 10*s.* 8*d.* That, in pursuance of the said agreement and of the said memorandum thereto added, and immediately after the making of the said valuation, to wit on 2d *April* 1844, defendants made and delivered to plaintiff the promissory note in the first count mentioned, for the purpose of securing payment of the sum of 41*l.* 0*s.* 8*d.* on 1st *September* then next, pursuant to the terms of the said agreement and memorandum, the said sum of 41*l.* 0*s.* 8*d.* with the said sum of 53*l.* 10*s.* 0*d.*, so to be paid to *Morritt* as aforesaid, amounting together to the said amount of the said valuation, to wit the sum of 94*l.* 10*s.* 8*d.* That there was not any consideration or value for the making or payment of the promissory note, save and except as aforesaid. That, after the making of the promissory note, but before the same became due and payable, and before the commencement of this suit, *to wit on 2d August* 1844, *Kilby* and *Todd*, so being such valuers as aforesaid, in further pursuance of the said agreement, and of the said memorandum so added thereto as aforesaid, and under and by virtue of the authority thereby given, revised and examined the said valuation of the said way-going crop and tenant right, and then made a certain alteration in the same, and thereby valued the said way-going crop and tenant-right at a certain other sum of money, differing from and less than the amount of the said first valuation, to wit the sum of 56*l.* 15*s.*; of which plaintiff then, to wit on the day and year last aforesaid, had notice: whereby, and by reason of such alteration of the said first valuation as aforesaid, the sum of money which the defendants became liable to pay on account of the said way-going crop and tenant-right, over and

above the said sum of 53*l.* 10*s.* so to be paid to the said *W. J. S. Morritt* as aforesaid, became and was reduced in amount from the said sum of 41*l.* 0*s.* 8*d.* to a much less sum, viz., 3*l.* 5*s.* and no more, the same being the said sum of 3*l.* 5*s.* in the introductory part of this plea mentioned. And, by reason of the said premises, the consideration for the payment of the said note, except so far as the same relates to the said difference between the said sum of 53*l.* 10*s.* and the said amount of the said revised valuation, to wit to the said sum of 3*l.* 5*s.*, parcel of the amount of the said note, has wholly failed. Verification.

Replication: De injuriâ. Issue thereon.

There were other issues, not material to the point here decided.

On the trial, before *Rolfe* B., at the *Yorkshire* summer assizes, 1845, the defendants proved the execution of the agreements of 30th *March* 1844 and 1st *April* 1844, as described in the plea. Both were duly stamped. The latter was written at the foot of the former, and was as follows.

"Memorandum. The above named parties hereby agreed that the valuation of the crop of corn within mentioned, and agreed to be made by the said valuers, shall be made and perfected immediately, and the amount thereof secured by a joint promissory note: but that such valuation shall be revised and examined by the said valuers above named *on the first day of* August *next;* and, if any alteration be made therein, the said parties mutually undertake and agree to abide by and fulfil the same in all respects whatsoever, and to pay and receive the amount thereof so to be ascertained on the said first day of *August* next. As witness the hands of

the said parties, the 1st day of *April*, 1844." Signed by the plaintiff, *Charles Copley* and the two defendants.

The plaintiff was the mother in law of *Charles Copley*, the outgoing tenant. The valuation was made on 1st *April* by *Kilby* and *Todd*, after the making of the agreement of that day. It amounted to 94*l.* 10*s.* 8*d.* The rent accruing on 6th *April*, 53*l.* 10*s.*, was deducted; and the promissory note mentioned in the first count was given by defendants for the balance of 41*l.* 0*s.* 8*d.*, payable on 1st *September* 1844. This note was deposited in the hands of a person named *Weddall*, who was the attorney for the defendants; and *Copley* gave up the farm to the defendants. On 31st *July* 1844, *Kilby* and *Todd* met: but, as it was then raining very heavily, they agreed that they could not fitly go over the crop. On 1st *August* they were both engaged at *Wetherby* market. On 2nd *August* they went together over the crop, agreed upon the quantity, but differed as to the price. On 12th *August* they (not having visited the crop again) finally agreed to a valuation, amounting to 56*l.* 15*s.*, which they put in writing and both signed, dating it 2d *August* 1844. The defendants contended that they were entitled to reduce the claim of the plaintiff on the promissory note by the sum of 37*l.* 15*s.* 8*d.*, the difference between 94*l.* 10*s.* 8*d.* and 56*l.* 15*s.*, which would reduce the claim from 41*l.* 0*s.* 8*d.* to 3*l.* 5*s.* For the plaintiff it was contended that the second valuation was inoperative, having been made after 1st *August*, the day named in the agreement of 1st *April*. The defendants gave evidence that no alteration had taken place in the value of the crops between 1st and 2nd *August*. They further proved that, on 20th *August*, the plaintiff called on the attorney of the

defendants, *Weddall*, with whom the note had been deposited, and that he then gave it up to her, on her signing a memorandum. The memorandum was then offered in evidence. It had no stamp, and was as follows.

"Copy of valuation, made by *Thomas Kilby* and *Christopher Todd*, of wheat now growing upon the farm of *Charles Copley* of *Colton*, total value 94*l.* 10*s.* 8*d.* *April* 1st 1844.

	£	s.	d.
Valuation as above - -	94	10	8
Rent due to Mr. *Morritt* -	53	10	0
Balance due to Mrs. *Marshall* -	41	0	8

and secured by the joint and several promissory note of Messrs. *George Powell* and *Septimus Powell*. This note is to be subject to the revised valuation of Messrs. *Todd* and *Kilby*, and will be more or less than 41*l.* 0*s.* 8*d.* accordingly as they value the corn.

"N.B. The note was given up to me by Mr. *Weddall* this 20th *August*, 1844."

The counsel for the defendants objected that this memorandum could not be received for want of a stamp: and the learned Judge, after argument, rejected it, and directed a verdict for the plaintiff on the above issue, giving leave to move to enter a verdict for the defendants.

In *Michaelmas* term 1844, *Watson* obtained a rule nisi to enter the verdict accordingly, or for a new trial on account of the rejection of evidence.

Baines and *Bliss* now shewed cause. First: the consideration for the note has not failed. The original

agreement could be superseded only by the alteration which might have taken place if the second agreement had been carried into effect: but this has not been done. The second agreement was only for a revision on the 1st *August*: there has been no such revision. The note is absolute; and a condition which is relied upon as operating in discharge must be performed strictly. An award, made after the day named, is not available. The parties themselves, in cases of this kind, give the time which they consider reasonable: if this be once deviated from, no limit can be assigned. In *Maryon* v. *Carter* (*a*) the defendant consented to pay 80*l.* provided certain houses should be completed, paved in front &c., by 21st *April* 1829; the foot pavement was not all laid down till 25th *April*: and it was held that, the condition not being fully performed, the 80*l.* could not be recovered. The condition being here imposed by contract, inevitable accident does not dispense with the performance; note (2) to *Walton* v. *Waterhouse* (*b*). The plea shews the repugnancy; for the materiality of the date appears on the record, and therefore the videlicet does not protect the allegation of performance.

Secondly: the memorandum of 20th *August* was not admissible in evidence upon the issue on this plea. [*Watson.* That objection was not made at the trial.] At any rate it was not admissible without an agreement stamp. The plaintiff sought to use it as evidence that the defendants had assented to the value being taken as fixed by the valuation of 2d *August.* This effect it can have only as being, or as proving, a fresh

(*a*) 4 *Car. & P.* 295. (*b*) 2 *Wms. Saund.* 422 *a.*

agreement (*a*). On the trial, *Mullett* v. *Huchison* (*b*) was cited for the plaintiff. But there the Court held that the memorandum only bound the party to do what he was bound to do without any express agreement, namely to redeliver bills which had been handed to him to be discounted, in the event of their not being discounted. And even that decision has been questioned; *Doe dem. Frankis* v. *Frankis* (*c*). *Vaughton* v. *Brine* (*d*), and especially the language of *Erskine* J. there, may be referred to on the other side: but in *Beeching* v. *Westbrook* (*e*) *Alderson* B. considered the test as to the necessity of a stamp to be, whether the letters were written after the making of the agreement or while it was being made: here the agreement on which the plaintiff must rely is contained entirely in the memorandum of 20th *August;* and it thus falls directly within the principle of *Knight* v. *Barber* (*g*).

Watson and *Hugh Hill*, contrà. First: the condition of the second agreement was substantially performed, because the value, as it existed on 1st *August*, was, as the evidence shewed, the value which was ascertained as it existed on 2nd *August*, since it was proved that the value was not changed in the interval. The value on 1st *August* must have been all that the parties meant to fix by assigning the day. The agreement must be interpreted by the condition and conduct of the parties; *Chapman* v. *Bluck* (*h*). [*Erle* J. Only by what is contemporaneous with the agreement. *Baines* referred to

(*a*) See *Stead* v. *Dawber*, 10 *A. & E.* 57.; *Marshall* v. *Lynn*, 6 *M. & W.* 109.

(*b*) 7 *B. & C.* 689.

(*c*) 11 *A. & E.* 792. 794, 795.

(*d*) 1 *M. & G.* 359. See *Vollans* v. *Fletcher*, 1 *Exch.* 20.

(*e*) 8 *M. & W.* 411.

(*g*) 16 *M. & W.* 66.

(*h*) 4 *New Ca.* 187.

Doe dem. Phillip v. *Benjamin* (*a*).] *Bowerbank* v. *Monteiro* (*b*) and *White* v. *Nicholson* (*c*) are instances in which the express terms of an agreement have been controlled by collateral circumstances. "The words of a condition shall be liberally expounded to serve the intent of the parties;" *Com. Dig. Condition* (E): and again, at (G 14.), "it is sufficient, if the substance of the condition be performed:" and, at (L 1.), "if the condition be performed in substance, it is sufficient." The parties here were the outgoing and incoming tenants: their object must have been to ascertain the value, at a given date, of the waygoing crop; the exact day of the valuation must have been entirely immaterial.

Secondly: the plaintiff has at any rate, by the memorandum of 20th *August*, admitted that she has assented (as she might do) to the valuation being taken on the 2nd. It is in the character of an admission only that the memorandum was offered in evidence: the case is therefore within the principle of *Mullett* v. *Huchison* (*d*) and *Langdon* v. *Wilson* (*e*). [*Erle* J. In *Tomkins* v. *Ashby* (*g*), referred to in those cases, there was only an admission that money had been left in the hands of the party signing the memorandum.] In *Doe dem. Frankis* v. *Frankis* (*h*) Lord *Denman* C. J. expressed his assent to the decision in *Mullett* v. *Huchison* (*d*), because the memorandum "was never meant to be evidence of the contract, though it contained what had formerly passed between the parties." That is the present case. *Blackwell* v. *M'Naughtan* (*i*) is also

(*a*) 9 *A. & E.* 644.
(*b*) 4 *Taunt.* 844.
(*c*) 4 *M. & G.* 95.
(*d*) 7 *B. & C.* 639.
(*e*) 7 *B. & C.* 640, note (*b*).
(*g*) 6 *B. & C.* 541. See *Clarke* v. *Chaplin*, 1 *Exch.* 26.
(*h*) 11 *A. & E.* 792.
(*i*) 1 *Q. B.* 127.

affirmative of *Mullett* v. *Huchison* (*a*). In *Watkins* v. *Hewlett* (*b*) a paper written by defendant, acknowledging the receipt from plaintiff of a promissory note, and stating that the note, when paid, would discharge plaintiff from the expenses of a bastard likely to be chargeable, but which was as yet unborn, was held not to require an agreement stamp. In *Rex* v. *St. Martin's, Leicester* (*c*), *Patteson* J. said that it was intended, by stat. 55 *G.* 3. *c.* 184. sched. part. 1. tit. *Agreement*, to impose a stamp on such writings only "as have *per se* the binding effect of an agreement." That cannot be said of this memorandum. *Vaughton* v. *Brine* (*d*) shews that, where the memorandum is not to operate as a contract inter partes, it requires no agreement stamp; and that principle was recognized in *Lucas* v. *Beach* (*e*).

Lord DENMAN C. J. The first point is very clear, although one may see that there is good sense in the construction contended for on the part of the defendants, and wish to give it effect; but we cannot do so upon the words of the agreement of 1st *April*. The amount payable on the promissory note is to be diminished by any reduction to be made on the revision of the valuation. But the way in which the parties agree that this revision should be made is essential: it is to be made on a day named, the 1st of *August*. It might have been wiser to agree simply that the revision should ascertain the value as it existed on that day. But, as the parties have agreed, instead of this, to mention the time at which the valuation was to take

(*a*) 7 *B.* & *C.* 639.
(*b*) 1 *Br.* & *B.* 1.
(*c*) 2 *A.* & *E.* 210 215.
(*d*) 1 *M.* & *G.* 359.
(*e*) 1 *M.* & *G.* 417. 420.

place, we cannot go out of the agreement: the memorandum designates the day for making the valuation, and contains no other provision as to time. We cannot transpose its language. If we could dispense with this condition, what limit could be assigned to the variation of the terms of the agreement in point of time? We should have to look for evidence of other facts, instead of confining our attention to the language used by the parties. As to the admissibility of the latest document, I think it required no stamp. It is merely a recapitulation of the former agreement; and its object seems to have been to shew that the promissory note was given up on the day named: and for this purpose I cannot but think it was receivable without a stamp. The former agreement, which was rehearsed, was properly stamped, and is binding. I cannot think that a memorandum which merely recites a former agreement requires a stamp. On that point, therefore, there must be a new trial.

COLERIDGE J. I am of the same opinion on both points. The agreement speaks of taking the valuation on a specific day. I cannot say that this precludes us from construing it by the aid of all the contemporaneous circumstances: but the burthen of proof is thrown upon those who require us to depart from the terms of the agreement. Here, on the first agreement, we see that the party who is to receive the value desires to obtain a security for what he is ultimately to have. For one purpose, therefore, a valuation is to take place immediately; and a security for the amount which results is to be given by a promissory note. But, inasmuch as risks may occur which it is impossible to anticipate,

the parties say, let us fix on some time at which it may be easier to ascertain the exact value, and have the valuation then revised. The time, then, is of the essence of the contract. They choose to agree for the 1st of *August*. I allow that they might have said, for instance, the first week of *August;* but they have chosen to limit the time to a single day; and that becomes of the essence of the contract for a revision. If the value might be ascertained a little before or a little after the day named, why not a great while before or a great while after? They must be bound by the terms into which they have chosen to enter. As to the second point, I agree with my Lord that no stamp was requisite. The memorandum comes after the time when the agreement was made; and, in pursuance of the agreement, the promissory note has been handed to a third person; and the memorandum might be evidence between the parties of what had taken place. It is said that this makes a stamp requisite, because the memorandum becomes evidence of an agreement. I cannot assent to this. I concur in what is said by Mr. Baron *Parke* and Mr. Justice *Erskine*, in the cases referred to: but it is enough to say now that a memorandum, to be evidence of an agreement in this sense, must be a minute or a memorandum which is obligatory. Now what the parties here adopt is not so: it only furnishes materials for the consideration of a jury. Suppose that an action were brought on a written agreement, which was put in, properly stamped, and a question arose upon the fact of its execution: a letter to a third party, containing a statement of the contract, would be very material evidence, but would surely not require a stamp. The rule for a new trial must therefore be absolute.

WIGHTMAN J. On the first point, I agree, very reluctantly, with my Lord and my brother *Coleridge*. But I think we are bound by the precise terms which the parties have chosen. They have made essential, not merely the value existing at a particular time, but the time of taking the valuation. By that they must be bound. The rule, therefore, for entering a verdict for the defendants must be discharged. On the second point I confess I have felt very great difficulty: and it is still not without doubt that I have come to the conclusion that the instrument is not a minute or memorandum of an agreement in itself, but rather an admission of a separate agreement.

ERLE J. I am of the same opinion. On construing and applying the words of the agreement of the 1st of *April*, I can come to no opinion other than that the parties meant the valuation to be taken on the day named. As to the question respecting the stamp, I think the instrument was merely a memorandum of the receipt and redelivery of the note in pursuance of a former agreement which is referred to in the instrument. It seems to me that such a memorandum requires no stamp.

Rule absolute for a new trial.

Monday, November 23rd.

The QUEEN *against* HARRISON and Others.

This Court refused a mandamus commanding overseers to permit a rate-payer to inspect their appointment by the justices, he deposing that he believed one of the overseers was not a substantial householder or a fit person to be overseer; that, as he, the applicant, was advised, the appointment was bad in law; and that he was desirous of bringing it before the Court, but could not do so without inspecting the appointment, which he had endeavoured without success to obtain.

PASHLEY, in last *Easter* term, obtained a rule in the Bail Court (before *Coleridge* J.), calling on *Joseph Harrison*, *Edward Birkett*, *John Fawcett* and *Adam Grundy*, overseers of the poor of the township of *Kirkby Lonsdale*, in *Westmoreland*, to shew cause why a mandamus should not issue, commanding them to permit *John Tennant* to have the sight and inspection of the appointment of them as overseers of the poor of the said township, made by the justices of the said county on or about 2nd *April* then last, and to take a copy thereof, or extracts therefrom.

The rule was obtained on the affidavit of *John Tennant* and *James Coulston*. *Tennant* deposed that he was a rated inhabitant of the township. That, since 2nd *April* 1846, *Harrison*, *Fawcett*, *Birkett and Grundy* had acted, and still continued to act, as overseers, and that, as deponent had been informed and believed, they had been appointed at a meeting of certain justices of the peace at *Kirkby Lonsdale*. That the justices present at the meeting were, as deponent had been informed and believed, *E. Tatham*, *W. Moore* and *W. A. F. Saunders*, Esquires: but deponent did not know, and, although he had made diligent enquiries, could not ascertain, by what justices in particular the appointment was made or signed. That deponent firmly and conscientiously believed that *Grundy* was not a substantial householder of the township, and not a fit person to be overseer. That, at the instance of several respectable ratepayers of the

township, with a view to have the appointment of the four "brought before this honourable Court to have the sufficiency and legality of the same appointment ascertained," deponent, about 16th *April* last, applied to the clerk of the justices who were present at the meeting, and asked which of the justices had signed the appointment, and requested further information respecting its form: but the clerk said he did not know which justices had signed, and could give no further information. That deponent applied, on the same day, to Messrs. *Tatham*, *Moore* and *Saunders*, then sitting in petty sessions, to inform him which had signed, stating to them that he wanted this and further information respecting the appointment for the purpose of instituting proceedings with a view to question its sufficiency and legality. That Mr. *Tatham*, who then, and also, as deponent was informed and believed, when the appointment was made, acted as chairman, after consulting with the other two justices, informed deponent that he did not remember who signed, but that, as the appointment was in the possession of the overseers, deponent had better apply to them for an inspection. That deponent thereupon applied to *Grundy*, who promised to produce it, but, on the following day, admitted that he had it in his possession, but refused to let deponent inspect it. That, on application to the other three overseers, each denied having the possession. That deponent, on 17th *April*, caused a written notice to be served on each of the four to produce the appointment on 18th *April* (the circumstances of which service were deposed to by *Coulston*); but it was not produced. *Tennant* further deposed "that he has been advised, and believes, that the said appoint-

ment of overseers, particularly so far as it relates to the said *A. Grundy*, is wholly bad in law, and that it is necessary, in order to have its validity or invalidity ascertained, that the said *J. Harrison*, *E. Birkett*, *J. Fawcett* and *A. Grundy*, or some or one of them, should be compelled to produce to this deponent the said appointment; for this deponent saith that the knowledge as to what justices signed the said appointment, and of the terms and form thereof, is, according to the belief of this deponent, confined to the said three justices of the peace, their clerk," and the four overseers, all of whom continued to refuse to produce the appointment. That deponent "desires to have an inspection of the said appointment, only for the purpose of having the legality and sufficiency of the said appointment tried, and for no other purpose whatsoever."

Affidavits in answer were made by the four overseers, from which it appeared that, on the recommendation of the previous overseers, they had been appointed by Messrs. *Moore* and *Tatham*; that *Tennant* had been dismissed from the office of assistant overseer for disobedience to the then overseers, upon a complaint made to the Poor Law Commissioners: and certain alleged vexatious conduct on his part since that time was deposed to. One of the principal rate-payers of the parish deposed that he was satisfied with the present appointment.

Godson and *Ramshay* now shewed cause. No ground appears for this application. *Rex* v. *The Justices of Leicester* (*a*), where this Court appears to have held

(*a*) 4 *B.* & *C.* 891.

that rate-payers have a right to inspect and take copies of county rates, has been expressly overruled as to this point (*a*). It is suggested by the affidavits that the applicant requires an inspection for the purpose of bringing the appointment before this Court. But he may appeal to the Quarter Sessions, and has only to give notice of the appeal to all the overseers. If the appointment be bad on the face of it, he may take advantage of the defect on the hearing at sessions. But this Court, supposing it to have the power, will not, in its discretion, encourage applications made merely for the purpose of discovering a defect. The objection, that one of the persons appointed is not a substantial householder, may be raised without the appointment being inspected.

Pashley, contrà. The applicant has, upon common law principles, a right to inspect the appointment. In *Rex* v. *Arnold* (*b*) this Court expressed a strong opinion that a town clerk was bound to allow a burgess to compare his own burgess list with the voting papers kept by the town clerk, and that the burgess ought to be permitted, on such comparison, to mark his own list, according to what he should find. It is argued that the proper remedy is appeal: but, in 4 *Burn's Justice*, 33. (29th ed.), it is said: "The appointment may be removed into Q. B. by certiorari at any time before the expiration of the year for which it was made." "Upon which the Court will go into the consideration, not only of defects apparent on the appointment itself, but of extrinsic objections appearing by

(*a*) See *Rex* v. *The Justices of Staffordshire*, 6 *A. & E.* 84. 101.
(*b*) 4 *A. & E.* 657.

affidavit, such as that the justices had no jurisdiction," &c. Here it is not denied that the objection as to *Grundy* exists: and the applicant is therefore entitled to inspect the parish document on which he must support his objection. It is not to be assumed that, so far as regards the general principle, *Rex* v. *The Justices of Leicester* (*a*) is overruled. And *Rex* v. *Great Farringdon* (*b*) affirms the right of a rated parishioner to inspect parish accounts in the hands of guardians. In *Fox* v. *Jones* (*c*) this Court compelled the Marshal to produce documents for the inspection of a party who required them as materials for an action against the Marshal himself. On the other side, an appeal is made to the discretion of the Court. But the only case in which the Court will deny a party his right to a certiorari for questioning proceedings in which he is interested is where he has in some way concurred in such proceedings, as in *Regina* v. *The Committee men for the South Holland Drainage* (*d*). Analogous applications are always granted in copyhold cases; *Rex* v. *Shelley* (*e*), *Ex parte Hutt* (*g*), *Ex parte Barnes* (*h*), in which cases the rule was made absolute in the first instance: and it is not necessary that there should be a suit depending; *Rex* v. *Lucas* (*i*), *Rex* v. *Tower* (*k*). It is suggested that this is a speculative motion: but the reverse appears; for, without an inspection, unfounded objections might be raised. Accordingly, this Court requires, on application for a certiorari, that the document

(*a*) 4 *B. & C.* 891.
(*b*) 9 *B. & C.* 541.
(*c*) 7 *B. & C.* 732.
(*d*) 8 *A. & E.* 429.
(*e*) 3 *T. R.* 141.
(*g*) 7 *Dowl. P. C.* 690.
(*h*) 2 *Dowl. P. C. N. S.* 20.
(*i*) 10 *East*, 235.
(*k*) 4 *M. & S.* 162.

should be shewn on affidavit, or a copy of it, or some excuse for its non production. In *Regina* v. *The Manchester and Leeds Railway Company* (*a*), this not being done, the Court refused the certiorari, and would not permit the omission to be supplied on a second application.

Lord DENMAN C. J. This is a very unreasonable application; and no authority for it can be shewn. The rule must be discharged with costs.

COLERIDGE J. I regret that I granted this rule. I admit that I had the affidavits before me; but they shew no ground for the application. The only ground for a certiorari would be, improper conduct in making or procuring the appointment. It is admitted that an appeal lies on all the objections which are here raised. This, therefore, is only a fishing application, made in the hope of finding out some defect, the existence of which is not suggested.

WIGHTMAN J. concurred.

Rule discharged, with costs (*b*).

(*a*) 8 *A. & E.* 413.

(*b*) *Erle* J. was absent.

Wednesday, November 25th.

SAYER *against* DUFAUR.

A defendant cannot, without special application to a judge, have a rule for a special jury before issue joined, although, being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for the special jury a sufficient number of days before trial.

THE defendant's attorney, on 17th *November* instant, obtained a rule for a special jury, on affidavit that defendant had pleaded, and that no notice of trial had been given. In this term, *November* 21st, *Lush* obtained a rule nisi to set aside the rule first mentioned, with costs, on affidavit that on 16th *November* instant defendant had pleaded several pleas, and that no replication had been delivered nor issue joined.

In answer it was deposed that, by an order of *Patteson* J., dated 12th *November* instant, defendant was under terms to take short notice of trial, if necessary, for the sittings in *London* during term, on obtaining time to plead till the *Monday* following (*November* 17th); that plaintiff could therefore have given notice of trial on the 20th of *November* (*a*), which defendant must have accepted; and that, if defendant had waited till notice of trial had been given or replication delivered (which replication might have been delivered with notice of trial), defendant would have been too late to move for a special jury (except on application to a judge for the purpose, and payment of costs), under the rule of Court *Hil.* 1 *Vict.* (*b*); and that the rule for a special jury was only obtained at the latest period the same could be so obtained under the rule of Court.

T. Jones now shewed cause. It is suggested that a rule for a special jury cannot be obtained before issue

(*a*) The only *London* sittings in *Michaelmas* term 1846 were on 24th *November*.

(*b*) 7 *A. & E.* 973.

joined: but no principle can be pointed out on which this is objectionable. In *Mondel* v. *Steele* (*a*) it was held that, under stat. 1 *W.* 4. *c.* 22. *s.* 4., witnesses could not be examined on interrogatories before issue joined; but that was because the witnesses must have been sworn to give evidence on the issue before an issue existed: that objection does not apply here. [*Erle* J. The words of the section are only "in every action depending in such Court;" the words in stat. 6 *G.* 4. *c.* 50. *s.* 30. are "in any case whatsoever," "depending in any of the said Courts." Can you interpret the two differently?] By *R. G. Hil.* 1 *Vict.* (*b*) the rule for a special jury, for a defendant, or for a plaintiff in replevin, can be granted only on affidavit either that no notice of trial has been given, or, if it has been given, then on affidavit stating what the day is; and then the application must be made more than six days before such day: but, on summons, a judge may order the rule to be drawn up at any time. Here the defendant is under terms to take short notice of trial for the sittings in *London*, which notice might have been given on 20th *November* for trial on 24th: it was therefore impossible for him to comply with the rule suggested. [*Coleridge* J. The practice for which you contend would take away the check which is obtained by requiring the party to go before a judge. You have chosen to put yourself under the terms of which you complain.]

Lush, contra, was stopped by the Court.

Per Curiam (*c*),

Rule absolute, with costs.

(*a*) 8 *M. & W.* 300. (*b*) 7 *A. & E.* 973.

(*c*) Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

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Wednesday, November 25th.

PEARCE *against* CHAPLIN.

On motion at Chambers to set aside judgment and execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons the plaintiff's attorney denied having received, the Judge made an order setting aside the judgment and execution without costs, but not embodying any decision as to the irregularity: and he added a direction that the defendant should bring no action. The defendant protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods.

Held that defendant, having thus far availed himself of the order, could not apply to the Court to rescind that part which forbade bringing an action.

A SUMMONS was obtained, calling upon the plaintiff to shew cause why the judgment signed and execution sued out, in this cause, "should not be set aside for irregularity with costs." On the hearing, before *Pollock* C. B., it appeared that the defendant had, as he alleged, served the plaintiff's attorneys with a summons for time to plead, by putting a copy through a slit in the door of their office, at half past six in the evening of *July* 24th. The plaintiff's attorneys denied having received such summons; and they signed judgment, and issued a fi. fa. into the country. A second summons for time was taken out and duly served; but they, having already taken steps for suing out execution, did not attend. The Lord Chief Baron, on the statements before him, directed that the judgment and execution should be set aside. The further proceedings were detailed by the clerk of the defendant's attorney (on affidavit in support of the aftermentioned application) as follows. "Upon the order being made," "this deponent mentioned to his Lordship that he did not ask for costs of the application; whereupon the plaintiff's agent" "begged of his Lordship to direct that no action should be brought: and this deponent then urged upon his Lordship not to impose any terms: and his Lordship then asked this deponent if it was the intention of the defendant to bring an action; to which this deponent replied that the plaintiff had had an

execution in his house for three days, and his shop shut up, and that he (the defendant) would most probably commence proceedings at law for the injury done him: and this deponent further said that he hoped his Lordship would not bar him from his legal rights if he (the defendant) thought proper to bring an action: and the said plaintiff's attorney then again begged of his Lordship to restrain the defendant from proceeding: and his Lordship then said, 'I think no action should be brought, it being a mistake,' and added to his indorsement on the said summons the following words, namely, 'no action to be brought,' without the consent of deponent, and although this deponent strongly protested against it." The deponent added that it was at that time the intention of the defendant to bring an action of trespass, and that he had instructed the deponent to issue a writ, which he would have done if the defendant had not been barred by the Lord Chief Baron's order. The form of the order was: "Upon hearing the attorneys or agents on both sides, and upon reading the respective affidavits of" &c., "I do order that the judgment signed herein, and the execution issued thereon, be set aside without costs: no action to be brought. Dated" &c. The sheriff, who had taken defendant's goods, relinquished them on being served with the Judge's order.

A rule was obtained this term, calling on the plaintiff to shew cause why so much of the order as directed that no action should be brought should not be rescinded.

Hugh Hill now shewed cause. The defendant, having obtained and acted upon this order, has made

himself party to it, and cannot now move to rescind it; *Giraud* v. *Austen* (*a*). The case is not that of a person compelled to take part in a proceeding for the protection of his own interests, as in *Phillips* v. *Broadley* (*b*).

The Court then called upon

Petersdorff, contrà. In *Giraud* v. *Austen* (*a*) the order was one which the Judge had authority to make. The Judge here had no power, without the defendant's consent, to debar him from bringing an action. [*Erle* J. If there was irregularity on the part of the plaintiff, had not you waived it, according to a large class of cases? *Hill*. The Judge's order does not profess to set aside the proceedings for irregularity, but only on terms.] Where the Court is obliged to set aside a judgment, the order is granted ex debito justitiæ, and judges have no power to annex the term that an action shall not be brought. This was decided in *Cash* v. *Wells* (*c*), where the judgment had been signed against good faith; and in *Abbott* v. *Greenwood* (*d*) and *Adlam* v. *Noble* (*e*), where it was merely irregular. Service of the order upon the sheriff was no waiver: the defendant unavoidably acted on the order to the extent to which he accepted it, but did not thereby waive his expressed dissent from the residue. [*Wightman* J. Was the Judge obliged to decide the question of irregularity? He might say, "it is so doubtful that I will not make the order unless the defendant agrees to bring no action."]

(*a*) 1 *Dowl. N. S.* 703.
(*b*) Antè, p. 744.
(*c*) 1 *B. & Ad.* 375.
(*d*) 7 *Dowl. P. C.* 534.
(*e*) 9 *Dowl. P. C.* 322.

Lord DENMAN C. J. I think we must assume on the statements that there was an irregularity. But the Judge set aside the proceedings without costs, and without deciding whether an irregularity had been committed or not. Then we find an order made that no action shall be brought, the defendant's attorney protesting against that restriction. But, notwithstanding his protest, he takes, and avails himself of, the order. We are then bound on principle to hold that he took it in its whole extent. There is no case which shews that when a party has acted upon such an order, and had the full benefit of it, he shall not be bound by all its terms.

COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Rule discharged, without costs.

END OF MICHAELMAS TERM.

MICHAELMAS VACATION (*a*).

Thursday, December 3d.

The QUEEN *against* ARNAUD and POWELL.

Under stat. 8 & 9 *Vict.* c. 89., a corporation within the United Kingdom, some members of which are foreigners and persons residing abroad, may register ships which are the property of such corporation.

MANDAMUS, directed to *Elias Arnaud*, collector, and *Thomas Powell*, comptroller, of the customs, in and for the port of *Liverpool*. The inducement suggested that the Queen, on 17th *February*, 3 *Vict.*, by Her letters patent under Her Great Seal, did make, ordain, constitute, declare and appoint that *George Brown*, &c. (naming eight others), or such of them as should become subscribers of not less than 1000*l.* each towards the capital or joint stock in the said letters patent mentioned, in the manner thereinafter provided, together with such and so many other persons or person, body or bodies politic or corporate, as should become subscribers of or towards the capital or joint stock thereinafter mentioned, in manner thereinafter provided, and such other person or persons, body or bodies politic or corporate, as should, from time to time, in the manner thereinafter provided, become a proprietor or proprietors of any part of such capital or joint stock, not being a fractional part of 50*l.* of such stock, should be one body politic and corporate, in deed and in name, for the period of twenty one years thereinafter mentioned, by the name of *The Pacific Steam Navigation Company*, and by that name should

(*a*) The Court sat in Banc on the 30th of *November* and five following days, and on the 17th of *December*.

and might sue and be sued, &c., and should have, for the said period of twenty one years, continual succession, with a common seal, which might be by them changed or varied at their pleasure. That the Queen did thereby declare that the said Corporation should be established for the purpose of providing vessels, to be impelled by steam or any other motive power, together with all engines, &c., necessary for the same, and of employing the same, and sailing vessels, if need should be, upon such stations as might appear to be expedient, within the limits in the said letters patent mentioned; and which were, therein and thereby, declared to be along the shores of *North* and *South America* in the *Pacific Ocean*, and likewise from or between those shores and the coasts of *China* and *New Holland*, both or either of them, inclusive of all intermediate islands; and also from or between the ports of *New Grenada*, *Central America*, and *Mexico*, in the *Atlantic Ocean*, all or either of them, and those of the *West Indies* in the event of there being a default or cessation of, or intermission in, regular monthly *British* Government mail conveyances between those ports, or any of them. And that the capital or joint stock of the said Corporation should consist of 250,000*l.* sterling, to be subscribed in five hundred shares of 50*l.* each; and that books should be opened for taking subscriptions to the said capital or joint stock; and that all and every person and persons, body and bodies politic or corporate, by and from any subscription, should be made and accepted, and any payment on account thereof made, pursuant to the provisions therein mentioned for that purpose, for or towards the raising of the said capital of 250,000*l.* sterling, as aforesaid: and his, her or their successors, executors, administra-

tors and assigns, respectively (no such subscription being for less than 50*l.* sterling and being either the sum of 50*l.* or some multiple of 50*l.*), should have and be entitled to a share of and in the said capital or joint stock of the said Corporation in proportion to the money which he, she or they should have so subscribed towards making up the same; and should have and be entitled to a proportionable share of the profits and advantages attending the capital stock of the said Corporation, and should be admitted to be a proprietor or proprietors of and in the same. Power was then given to the several proprietors of the said Corporation, their executors, &c., to sell and transfer their shares or any part thereof, not being less than 50*l.* &c. (as above); and it was directed that every such transfer should be in such form, and to such effect, as should be devised by the court of directors for the time being of the said Corporation; and that every such transfer should be under the hand or hands, or hand and seal, or hands and seals, or the common seal, of the proprietor or proprietors so transferring such stock, or of some person or persons lawfully authorized &c. (here followed further provisions as to making and registering the transfers); and that such transfer should convey the whole estate and interest therein of the proprietor or proprietors, so transferring &c., to the person or persons, body politic or corporate, so taking or accepting the same; which person &c. should thereby forthwith become in all respects proprietor or proprietors of the said Corporation in respect of such stock, in place of such proprietor or proprietors so transferring the same; and that every such transfer should be subject to the approbation of the directors for the time being

of the said Corporation, to be certified as in the letters patent was directed. That the Queen, by the said letters patent, granted to the Company and their successors, and did thereby further will and direct, that it should be lawful for the said Corporation, for the period of twenty one years, commencing &c., from time to time, out of the funds &c. of the Corporation, to build, purchase or hire such vessels, steam engines, &c. as might appear to them necessary for the purposes of the said Corporation, and that they might build, &c., hire and provide such sailing vessels as might be necessary for carrying on the business of the said Corporation: provided &c. (restriction as to the purposes for which the vessels should be employed except within the limits aforesaid): and that it should be lawful for the said Corporation, notwithstanding the statutes of mortmain &c., to purchase, and hold to them and their successors, such wharfs, docks, &c., and such ships &c., as should from time to time be actually and bonâ fide necessary and proper for the purpose of managing, conducting and carrying on their affairs, concerns and business. Other formal parts of the letters patent were then set out; and it was declared that they should be recognized as valid by all Courts &c., and should be taken, construed and adjudged in the most favourable and beneficial sense, and for the best advantage of the said Corporation, in the Courts of the United Kingdom and elsewhere.

The writ then suggested that, after the granting of the letters patent, the said *George Brown*, &c. did respectively become subscribers, of not less than 1000*l.* each, towards the capital or joint stock of the said Corporation; and that divers other persons also became

subscribers of or towards the said capital or joint stock, in manner in the said letters patent provided; and that divers persons, from time to time, in the manner therein provided, became proprietors of part of such capital or joint stock, not being a fractional part of 50*l.* of such stock: And that afterwards, and whilst the said Company therein mentioned was a corporate body in the said United Kingdom of *Great Britain* and *Ireland*, under and by virtue of the said letters patent, the said Corporation did, under and in pursuance of the provisions therein contained, purchase &c., out of the funds and property of the said Corporation, a certain steam ship or vessel, which was wholly of the build of the said United Kingdom, called &c. the *Ecuador*, and which appeared to them, and was, necessary for the purposes of the Corporation, and was so purchased for the purpose of being employed by the said Corporation for the said purposes within the limits in the letters patent mentioned, and not otherwise. The writ then stated that, before any such employment of the said steam ship, the said Corporation were desirous that the same should be duly registered; and averments then followed, shewing that the ship, at the time of the application after mentioned, belonged to the port of *Liverpool*, and to the said Corporation; and that, before such application, the conditions required by the Register Act, 8 & 9 *Vict. c.* 89., had been fulfilled. And that *William Taggart*, of &c., then being secretary of the said Corporation, on &c., applied to and requested defendants, at the said port of *Liverpool*, to register, or concur in the registration at the said port of, the said steam ship, according to the act, upon the said *W. T.* then taking and subscribing, as such secretary, the de-

claration prescribed by the said act in cases where it shall become necessary to register any ship or vessel belonging to any corporate body in the United Kingdom: and that *W. T.*, as such secretary, was then ready and willing to take and subscribe such declaration, but defendants then and there refused to register, or concur &c., upon such declaration being taken &c. In contempt &c.

The writ then commanded them, the collector and comptroller of the customs in and for the said port of *Liverpool*, to register, or concur in the registering &c., according to the act, or shew cause &c.

Return. That, before and at the time of the application to us for the registration of the said ship, the said ship did not wholly belong to Her Majesty's subjects, duly entitled to be owners of ships or vessels registered by virtue of the said act of parliament, 8 & 9 *Vict. c.* 89.; and that divers, to wit ten, persons, whose names are to defendants unknown, being foreigners, and divers, to wit ten, other persons, whose names &c. (as before), being foreigners, and before then having taken the oath of allegiance to a certain foreign state, viz. the state of *Mexico*, not under the terms of any capitulation, and not having afterwards become denizens or naturalized subjects of the United Kingdom by Her Majesty's letters patent or by Act of Parliament, and divers, &c., other persons, whose names &c., being persons usually residing in a certain country not under the dominion of her Majesty, to wit in *Mexico* aforesaid, and not then being members of any *British* factory, or agents for or partners in any house &c. actually carrying on trade in *Great Britain* or *Ireland*, before and at the time of the application to defendants for registration, were part owners of, and interested in, and had part

interest in, the said ship, and were entitled to share the profits and advantages attending the employment of the same. And therefore defendants could not register or concur in the registration of the ship, according to the provisions of the said act of parliament.

Plea. After protest that the return was insufficient in law: That the said ship did, before and at the time of the application to defendants for the registration thereof, wholly belong to a subject of her Majesty duly entitled to be the owner of ships or vessels registered by virtue of the said act of parliament, to wit the said *Pacific Steam Navigation Company*, so then being such corporate body in the said United Kingdom as aforesaid: and that the said persons in the said return to the said writ mentioned were not, before or at the time of the said application to defendants for the registration of the said ship, part owners of, nor was any or either of them then part owner of, or interested in, nor had they or any or either of them part interest in, the said ship, otherwise than as being members and proprietors, or a member and proprietor, of the said Corporation, to wit by the subscriptions for, or the purchase of, shares in the capital or joint stock thereof, under and in pursuance of and according to the said provisions so as aforesaid contained in the said letters patent. Verification.

General demurrer. Joinder.

Sir. *F. Thesiger*, for the defendants. The question is, whether a corporation aggregate, of which some of the members are foreigners, can claim to be registered in its corporate character. If, as the prosecutors contend, it can, any number of foreigners, by becoming members of a corporation, may evade the policy of the Navigation laws. The object of the legislature has always been to

exclude foreigners from the privileges of *British* ship-owners. Stat. 12 *C.* 2. *c.* 18. *s.* 10. enacted that no foreign built ship should enjoy the privilege of a *British* ship until the persons claiming the property should satisfy the officer, by oath, that they were not aliens; and that all the part owners should be liable to take such oath. Stat. 7 & 8 *W.* 3. *c.* 22. *s.* 17. applies a similar provision to ships trading with the plantations; and the oath, there set forth, states "that no foreigner, directly or indirectly, hath any share, or part, or interest" in the vessel. The same appears in the oath imposed by stat. 26 *G.* 3. *c.* 60. *s.* 10.; and sect. 15 of that act provides for giving up the certificate of registry if any interest in the ship shall pass to a foreigner. Sect. 5 of stat. 27 *G.* 3. *c.* 19. prescribes an oath to be taken where a vessel is the property of a body corporate within the kingdom: that oath is the same as the declaration required under stat. 8 & 9 *Vict.* *c.* 89. *s.* 13.; and no variation of importance appears in the intermediate statutes 4 *G.* 4. *c.* 41. (*a*), and 6 *G.* 4. *c.* 110 (*b*). The declaration in stat. 8 & 9 *Vict.* *c.* 89. *s.* 13. must be interpreted by the other sections: and sect. 5 confines the registration to such ships as "shall wholly belong and continue wholly to belong to her Majesty's subjects;" and sect. 12 expressly prohibits any "person who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation," unless afterwards naturalized, and any person usually resident out of the Queen's dominions (except members of *British* factories, &c.), from being "the owner, in whole or part, directly or indirectly," of a vessel requiring to be registered. It will be argued, on the other side, that the

(*a*) See sect. 31.

(*b*) See sect. 14.

property is in the Corporation. But that is a property which cannot exist legally where foreigners are part owners; and a charter of incorporation, on the face of which it appeared that foreigners were authorized to be partially interested in *British* registered ships, would be void. And sect. 23 provides, as in earlier statutes, for delivering up the certificate of registry when any foreigner becomes a part-owner. It cannot be supposed that the legislature intended to prevent foreigners becoming owners after registration, yet allowed them to be so at the time of registration. Sect. 13, which, in the case of registering for a corporation, imposes the declaration there set forth, cannot be construed as repealing sects. 5 and 12. [*Coleridge* J. The registration on behalf of a corporation appears to have been, from the first, a case excepted from the ordinary course of the legislature: the oath is taken by the secretary, and does not include the clause negativing interest in foreigners.] The corporation "in the United Kingdom" is, in some sense, a *British* subject: the form of declaration cannot operate as a repeal of the earlier sections. In *Rex* v. *Hanger* (*a*) the following statement appears. "31 *E.* 1. Chart' Mercator,' la ley fit touts estrangers a prender per cest charter come un corporation, et ils come un corporation a regranter al Roy, car a cest purpose enter le Roy et eux ils sont un corporation, mes nemy quant al subjects, Regist. 259. f. n. 227." On inspection of the Register, it appears that this was a charter by which foreign merchants were made free of certain duties. If the charter had conferred on them the character of *English* merchants, it would have been void. If the Corporation

(*a*) 1 *Rol. Rep.* 138. 148. *S. C. Moore*, 832., and, more fully, 3 *Bulst.* 1. See pp. 15, 22, 25.

now in question had sued for freight, the members could not have been witnesses before stat. 6 & 7 *Vict.* *c.* 85.; perhaps, under the first proviso in sect. 1, they cannot even now. How then can it be said that each member is not, at least, owner "indirectly?"

M. D. Hill, contrà. It is not to be assumed that the legislature intended absolutely to prohibit foreigners from holding any interest in a registered ship. By sects. 45 and 46 of stat. 8 & 9 *Vict.* *c.* 89., a mortgagee may appear, on the face of the registry, to be owner: and yet there is nothing to prevent a foreigner from being mortgagee. So a ship may be hypothecated to a foreigner; or a foreigner may take an indirect interest by a bottomry bond. The argument on the other side must go the length of maintaining that, if a single foreigner be a member of a corporation, the corporation cannot register, whereas stat. 27 *G.* 3. *c.* 19. *s.* 5. enacts that nothing in stat. 26 *G.* 3. *c.* 60. shall prevent registry of ships belonging to bodies corporate, though the statute last named excludes foreigners, as individuals, from being part owners of registered ships. Stock of the *East India* Company may be sold to a foreigner: but that surely could not have invalidated the registry of all the Company's ships. If the argument on the other side be correct, the certificate granted to a corporation consisting wholly of *British* subjects might become void, under sect. 12 of stat. 8 & 9 *Vict.* *c.* 89., if any member of the corporation were permanently to reside abroad. The registrar is only a ministerial officer: he has no power to enquire who the members of a corporation are, but must register on fulfilment of the requisites of sect. 13. Where power to inquire

is given, it is conferred by express words, as in sect. 15. If a corporation in the United Kingdom be not within the definition of a *British* subject, it is not true that registration is confined to *British* subjects: but, if such a corporation is, in the legal sense, a *British* subject, then, as such, it is entitled to register. The individual character of the partners disappears in corporations; they are "artificial persons;" 1 *Blackst. Com.* 467. The case is not like that of an ordinary partnership, where the law looks to the several members, and will, for instance, take the partner's share in the goods for his individual debt. A member of a corporation could not indeed be a witness, formerly, on behalf of the corporation: but that was because he took an interest in the result, not because he was a party to the suit; this is the ground of the decision in *Doe dem. Mayor &c. of Stafford* v. *Tooth* (*a*). An alien may be a member of an *English* corporation; *Co. Lit.* 129 *a*, *b.*; even an alien enemy; *Gilb. Hist. C. P.* 206.

Sir *F. Thesiger*, in reply. The argument drawn from sects. 45, 46, assumes the point in dispute; if a foreigner became mortgagee the certificate would be void, under sect. 12. A mere trustee for sale is owner for that purpose only, and therefore not within the prohibition. In the case of a bottomry bond no interest in the vessel itself passes. [*Coleridge* J. The obligee must insure in that character; he does not insure an interest in the vessel.] That is clearly so. And the hypothecation of a ship gives only a lien or right of security, not a legal immediate ownership.

(*a*) 3 *Y. & J.* 19.

Lord DENMAN C. J. The object of the present mandamus is to compel the custom house officers to register a vessel, the property of *The Pacific Steam Navigation Company.* The Company is a corporation, by charter of Her present Majesty, for the purpose of providing vessels and employing them in the *Pacific Ocean.*

It is admitted by the defendants that the Company, as a *British* corporation, might be *owners* of *British* built vessels, and primâ facie would be, as such corporation, entitled to register them under the provisions of stat. 8 & 9 *Vict. c.* 89., applicable to the registry of vessels by corporations. But it is said that some of the members of the Corporation are not *British* subjects, but foreigners, and, consequently, that the vessel does not *wholly* belong to Her Majesty's subjects, as required by the fifth section of the act, and is within the prohibition, contained in the twelfth section of the act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered.

Now it appears to us that the *British* Corporation is, as such, the *sole owner* of the ship, and a *British* subject within the meaning of the fifth section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the Company, and that such individual members of the Corporation are not entitled, in whole or in part, directly or indirectly, to be *owners* of the vessel.

The individual members of the Corporation, no doubt, are interested, in one sense, in the property of the Corporation, as they may derive individual benefit from its increase, or loss from its destruction: but in

no *legal sense* are the individual members the owners. If all the individuals of the Corporation were duly qualified *British* subjects, they could not register the vessel in their individual names *as owners*, but must register it as belonging wholly to the Corporation as owner.

The terms of the 23d section, with respect to the condition of the bond to be given upon obtaining the registry, as to foreigners purchasing or becoming entitled to any part or share of, or interest in, any ship or vessel, would appear to be applicable to a case of purchase or transfer of property in the vessel itself, as it provides that the certificate shall be delivered up "within seven days after such purchase or transfer of property in such ship," and does not, as it seems to us, bear materially on the present question.

It was contended that the effect might be to defeat the object and policy of the Navigation laws in this respect. The individual members of the *British* Corporation might, either originally or by transfer, be all foreigners. Such does not appear to be contemplated or provided for by the act in question. If it be casus omissus, and evil consequences arise, they may be remedied by the interference of the legislature, or possibly, though I do not wish to be understood as giving any opinion upon this point, by repealing the letters patent as improvidently giving powers operating to defeat the law and public policy; and, in future patents, providing against the objection: but, as the case stands, it seems to us that the *British* corporation is to all intents the legal owner of the vessel, and entitled to the registry, and that we cannot notice any disqualification of an individual member which might disable him, if owner, from registering the vessel in his own name.

And there will therefore be judgment for the prosecutors, and a peremptory mandamus.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

Judgment accordingly.

Counsel then agreed that the registration should take place without a peremptory mandamus (*a*).

(*a*) See stat. 12 & 13 *Vict. c.* 29.

BAINBRIDGE *against* LAX, JOHN BOURNE, and Others.

Friday, December 4th.

In trespass, defendant pleaded that, disputes existing between plaintiff and defendant, including plaintiff's claim in respect of the alleged trespass, it was agreed by plaintiff and defendant that the claims should be mutually relinquished, and defendant should pay to plaintiff 5*l.* as a final settlement and full satisfaction and discharge of all

TRESPASS for breaking and entering plaintiff's dwelling house, and taking his chattels, and converting.

Plea 2. That, after the committing &c., and before the commencement of this suit, to wit on &c., divers disputes and differences, and mutual claims and demands, existed between plaintiff and defendant *John Bourne;* and the same included, amongst other things, the claims, damages and rights of action of plaintiff in respect of the alleged trespasses in the declaration mentioned. And, for putting an end to the same, it was then agreed, by and between plaintiff and *J. B.*, that the said disputes, differences, claims and demands

plaintiff's claims against defendant, and, amongst other things, of all damages sustained by plaintiff by reason of the trespass; and defendant did, in pursuance of such agreement, before the commencement of the action, pay plaintiff the said sum, as a final settlement and full satisfaction and discharge of all claims &c., and, amongst other things, of all damages &c. (as before); and plaintiff did, before commencement &c., accept and receive from defendant, as such settlement, satisfaction and discharge, the said sum.

Held, that a replication traversing the agreement, though not noticing the payment or acceptance, answered the plea.

should be mutually relinquished and forgiven, and that *J. B.* should pay and deliver to plaintiff a certain sum of money, to wit 5*l.*, as a final settlement and full satisfaction and discharge of all claims of plaintiff against defendant *J. B.*, and, amongst other things, of all damages whatever sustained by plaintiff by reason of the trespasses in the declaration mentioned. That thereupon, afterwards, in pursuance of such agreement, to wit on &c., and before the commencement of this suit, the said disputes, &c. were mutually relinquished and forgiven, and defendant *J. B.* did then, and before the commencement of this suit, pay and deliver to plaintiff the said sum of money, to wit 5*l.*, as a final settlement and full satisfaction and discharge of all claims of plaintiff against defendant *J. B.*, and, amongst other things, of all damages whatever sustained by plaintiff by reason of the trespasses in the declaration mentioned: and plaintiff did then, and before the commencement of this suit, accept and receive from defendant *J. B.*, as such settlement, satisfaction and discharge as aforesaid, the said money so to plaintiff paid and delivered as aforesaid. Verification.

Replication to plea 2. That it was not agreed, by and between plaintiff and defendant *J. B.*, that the said disputes, differences, claims and demands should be mutually relinquished and forgiven, and that defendant *J. B.* should pay and deliver to plaintiff a certain sum of money as a final settlement and full satisfaction and discharge of all claims of plaintiff against defendant *J. B.*, and, amongst other things, of all damages whatever sustained by plaintiff by reason of the trespasses in the declaration mentioned, in manner and form &c. Conclusion to the country. Issue thereon. There were other issues, not now material.

On the trial, before *Cresswell* J., at the *Yorkshire* Summer assizes, 1845, a verdict was found for the plaintiff on the issue first mentioned. In *Michaelmas* term, 1845, *Knowles* obtained a rule calling on the plaintiff to shew cause why a repleader on this issue should not be awarded, or why the judgment should not be arrested.

Watson (with whom was *Bliss*) now shewed cause. First, the issue is material: secondly, the defendants can neither have a repleader nor arrest the judgment. The agreement cannot be separated from the actual satisfaction, which becomes a satisfaction only by virtue of the agreement: a traverse of the agreement therefore answers the plea. The plea really sets up, in answer to the complaint, an agreement and performance: therefore it adds that the plaintiff accepted, "as *such* settlement" &c., "the *said* money." The ordinary plea of accord and satisfaction is here expanded: and, by a traverse of the satisfaction, the agreement would have been admitted. In *Bro. Abr.* tit. *Traverse per sans ceo*, pl. 179., *Brian* C. J. is reported as saying: "in trespas le defendant pled' in satisfaction, ceo est tantum traversable, mes sil pled' accord' ou pled' submission, arbitrement, et satisfaction, le partie poit traverse laccord', le submission, arbiterment, ou le satisfaction, car quant le party voit allcage les circumstances et ne besoigne, la ceo est traversable, quod nota." The *Yearbook*, *Trin.* 4 *H.* 7. fol. 9 B. pl. 2., is referred to, where the Chief Justice says, "jeo scay bien que est common erudition a ceo jour." In *Peytoe's Case* (*a*) Lord *Coke* says: "*Nota* reader, the best and most secure form

(*a*) 9 *Rep.* 77 *b.* 80 *b.*

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of pleading of an accord, is to plead it by way of satisfaction, and not by way of accord, for if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and if he fails of any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more, than that the defendant paid the plaintiff 6*l.* 10*s.* in full satisfaction of the same action, which the plaintiff received, &c. judgment if action?" Here the plea is by way of accord. (He was then stopped by the Court.)

Granger and *Rew*, contrà. *Gordon* v. *Ellis* (*a*) shews that a repleader is the proper course where the replication leaves unanswered so much of the plea as constitutes a bar: and that is the case here. The words "such" and "said" make no difference: the payment and acceptance in satisfaction, however originating, answers the complaint. A traverse of such payment and acceptance would have answered the plea: the authorities cited do not apply where, as here, there is an independent averment of satisfaction given and accepted. All of the plea that is traversed might be struck out, and a good answer left on the record. Or, even if the plea were now shaped precisely upon the finding of the jury, it would only appear that, no previous agreement having been made, the defendants gave a satisfaction which the plaintiff accepted as such: and that would be a good plea. "To constitute an acceptance, there must be an act of the will. Every receipt is not an acceptance: but if the party accepts the thing, though but for a moment, for that for which the other pays it, he cannot afterwards, by his subsequent dissatisfaction, get

(*a*) 7 *M. & G.* 607.

rid of the effect of it;" *Hardman* v. *Bellhouse* (*a*), per *Alderson* B. If the traverse of the agreement answer the plea, an avoidance would also be an answer: but, if it appeared on the record that the agreement was abandoned, yet afterwards the plaintiff accepted the money in satisfaction, would not that bar the action? In *Thurman* v. *Wild* (*b*) the defence was that defendant committed the trespass as *B.*'s servant, and that plaintiff had accepted satisfaction from *B.*; and it was holden to be immaterial whether defendant consented or not to the satisfaction.

Lord DENMAN C. J. It is clear that the agreement described in the plea is made an ingredient in the satisfaction: it is therefore properly put in issue.

PATTESON J. The two are clearly mixed up. The acceptance alone is immaterial: the case is like that of an award.

COLERIDGE J. The payment is nothing without that being shewn for which it is made. We cannot separate it from the agreement. The plea would be bad if it did not, either briefly or in full, shew the agreement.

WIGHTMAN J. The satisfaction is pleaded as made in pursuance of the agreement: and, if the party chooses so to plead it, he makes the agreement material and traversable, according to the remark cited from *Peytoe's Case* (*c*).

Rule discharged.

(*a*) 9 *M. & W.* 596. 600. (*b*) 11 *A. & E.* 453.
(*c*) 9 *Rep.* 80 *b.*

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Thursday, December 17th.

The Queen *against* The Inhabitants of St. Paul, Covent Garden.

Reported, 7 *Q. B.* 533.

Thursday, December 17th.

The Queen *against* Gompertz, Lewis, William Witham, Robert Witham and Francis Witham.

A count in an indictment is good which simply charges that defendants, unlawfully, &c., did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud *R.* of his moneys.

Where an indictment for conspiracy contains several counts, if only a single conspiracy be proved, the verdict may nevertheless be taken on so many of the counts as describe the conspiracy consistently with the proof.

In the course of proving a conspiracy to defraud, carried into effect by prevailing upon the prosecutor to accept bills, a warrant of attorney, given to him for the purpose of inducing him to accept, reciting the acceptance, may be given in evidence, though unstamped.

An indictment for conspiring to defraud the prosecutor may be supported by proof of a conspiracy to obtain his acceptances, though the prosecutor part with no money, and though he never has intended to take up the acceptances, and though the bills were never in his hands except for the purpose of his accepting.

Where all of several defendants in an indictment for conspiracy are found Guilty, if one of them shew himself entitled to a new trial on grounds not affecting the others, the new trial will nevertheless be granted as to all.

INDICTMENT for conspiracy. The first two counts charged that defendants, devising, &c. to injure *George Pitt Rose*, conspired as in those counts stated.

Third count. That defendants, devising &c. as aforesaid, to wit on 21st *July*, 5th *Victoria*, with force and arms, at &c., unlawfully, falsely, fraudulently and deceitfully did conspire, combine, confederate and agree together, unlawfully and by indirect means, to obtain, acquire and get into their hands and possession, of and from the said *G. P. Rose*, certain bills of exchange, accepted by *G. P. R.*, amounting altogether to a large

&c., to wit 7000*l.*, and to cheat and defraud *G. P. R.* of the proceeds of the bills of exchange so accepted as aforesaid. That, in pursuance of the said last mentioned conspiracy &c., defendants, well knowing that *G. P. R.* was desirous of borrowing a sum of money upon certain security possessed by *G. P. R.*, to wit on 8th *September* in the year aforesaid, at &c., did falsely pretend, assert and affirm to *G. P. R.* that one *William Parker*, of *Paris* in the kingdom of *France*, and then resident at *Hatchett's Hotel*, *Piccadilly*, in *Middlesex*, a friend of the said *Henry Gompertz*, and a client of the said *W. Witham*, *R. Witham* and *F. Witham* (*a*), had agreed to lend and advance to *G. P. R.* and *H. Gompertz* the sum of 55,000*l.*, the sum of 42,500*l.*, part thereof, to be received by *G. P. R.*, and 12,500*l.*, the remainder thereof, to be received by *Henry Gompertz*; that the sum of 55,000*l.* was lying waiting for them, the said *G. P. R.* and *H. Gompertz*, at Messrs. *Hoares'*, the bankers of the said *W. Parker*, and that, if the said *G. P. R.* would accept bills of exchange to the amount of 5000*l.*, in addition to a certain other bill of exchange before then accepted by *G. P. R.* for the sum of 1000*l.*, and would also accept a certain other bill of exchange for 2000*l.*, they the said *W. Witham*, *R. Witham* and *F. Witham* should and would retain, for the said *G. P. R.*, the sum of 6000*l.*, out of the said *H. Gompertz*'s share of the said loan or sum of 55,000*l.*, and should and would also pay and discharge certain claims upon *G. P. R.*, amounting to the further sum of 2000*l.*, out of the said *G. P. R.*'s share of the said loan or sum of 55,000*l.*

(*a*) These three defendants and *Lewis*, were described in the first count as attorneys at law.

By means of which false pretences, and in further pursuance of the last mentioned conspiracy &c., defendants afterwards, to wit on &c., at &c., did obtain, acquire and get into their hands and possession, of and from *G. P. R.*, certain other bills of exchange, accepted by *G. P. R.* and payable at a future day, for divers other large sums of money, amounting in the whole to a large &c., to wit 7000*l.*, that is to say four bills of exchange for the respective sums of 1000*l.* each, two bills of exchange for the respective sums of 500*l.* each, and one other bill of exchange for the sum of 2000*l.* Whereas, in truth and in fact, one *W. Parker*, of *Paris* in the kingdom of *France*, and then resident at *Hatchett's Hotel*, *Piccadilly*, in *Middlesex*, a friend of the said *H. Gompertz*, and a client of the said *W. Witham*, *R. Witham* and *F. Witham*, had not agreed to lend and advance to *G. P. R.* and *H. Gompertz* the sum of 55,000*l.*, the sum of 42,500*l.*, part thereof, to be received by *G. P. R.*, and the sum of 12,500*l.*, the remainder thereof, to be received by *H. Gompertz*: and whereas, in truth &c., the said sum of 55,000*l.* was not lying waiting for them, the said *G. P. R.* and *H. Gompertz*, at Messrs. *Hoares'*, the bankers of the said *W. Parker*: and whereas, in truth &c., if the said *G. P. R.* would accept bills of exchange to the amount of 5000*l.*, in addition to a certain other bill of exchange before then accepted by *G. P. R.* for the sum of 1000*l.*, and would also accept a certain other bill for 2000*l.*, they the said *W. Witham*, *R. Witham* and *F. Witham* could not retain for the said *G. P. R.* the sum of 6000*l.* out of the said *H. Gompertz*'s share of the said loan or sum of 55,000*l.*, and would not also pay and discharge certain claims upon the said *G. P. R.*,

amounting to the further sum of 2,000*l.*, out of *G. P. R.*'s share of the said loan or sum of 55,000*l.*: and whereas, in truth &c., there was no such person as *W. Parker* of *Paris* in the kingdom of *France*, and then resident at *Hatchett's Hotel*, *Piccadilly*, in *Middlesex*, a friend of the said *H. Gompertz*, and a client of the said *W. Witham*, *R. Witham* and *F. Witham*: and whereas, in truth &c., defendants well knew that no advance of money was intended to be made to *G. P. R.* by *W. Parker*, or by any other person whatsoever: and, on the contrary thereof, defendants, during all the time last aforesaid, intended only to obtain and acquire to themselves the said several bills of exchange, so accepted as aforesaid, and to convert the same to their own use, and utterly to cheat and defraud the said *G. P. R.* of the same and of the proceeds thereof.

Fourth count. That defendants, unlawfully &c., did conspire, &c. to procure and enable *H. Gompertz*, unlawfully and by indirect means, to obtain, acquire and get into his hands and possession, of and from *George Pitt Rose*, certain bills of exchange accepted by *G. P. R.*, amounting together to a large sum of money, to wit the sum of 5000*l.*, and cheat and defraud the said *G. P. R.* of the proceeds thereof. That, in pursuance &c., defendants did afterwards falsely pretend, assert and affirm to *G. P. R.* that one *W. Parker*, of &c., and then resident at &c., in *Middlesex*, had agreed &c.: the count then stated the pretence as in the third count, omitting the averment as to the acceptance of the previous bill for 1,000*l.*, and of the other bill for 2,000*l.*, and stating that the 6,000*l.* was to be retained "to answer the said last mentioned bills of exchange and a certain other bill of exchange for the sum of 1,000*l.*, before then

drawn" by *Gompertz* upon *G. P. R.* By means of which false &c. *Gompertz* did then acquire and get into his hands and possession, of and from *G. P. R.*, certain other bills &c., accepted by *G. P. R.* (for 5,000*l.* as in the third count, omitting the bill for 2,000*l.*). Whereas, in truth &c.; negativing as before, mutatis mutandis.

Fifth count. That defendants, unlawfully, &c., did conspire, combine, confederate and agree together, by divers false pretences and subtle means and devices, to cheat and defraud *G. P. Rose* of divers large sums of money, of the proper moneys of *G. P. R.* That, in pursuance of the last mentioned conspiracy, &c., defendants afterwards, to wit on &c., and on divers other days &c., at &c., did, by divers false pretences and representations and subtle devices and contrivances, obtain and acquire to themselves, of and from *G. P. R.*, divers large sums of money, amounting in the whole to a large &c., to wit 10,050*l.*, of the moneys of *G. P. R.*, and did then and there cheat and defraud *G. P. R.* of the same respectively.

Sixth count. That defendants, contriving and intending fraudulently and by indirect means to cheat and defraud *G. P. R.* of his moneys, on &c., at &c., unlawfully, falsely, fraudulently and deceitfully did conspire, combine, confederate and agree together, by false pretences and subtle means and devices, to cheat and defraud *G. P. R.* That, in further pursuance &c., defendants on &c., at &c., did, by divers false pretences and representations, and by divers subtle stratagems, means, devices and contrivances, procure, obtain, acquire and get into their hands and possession, of and from *G. P. R.*, divers bills of exchange accepted by *G. P. R.*, and respectively payable at a future day, of

great amount and value, to wit 10,050*l.*; and did then and there cheat and defraud *G. P. R.* of the same, and of the proceeds thereof respectively.

Seventh count. That defendants, on &c., at &c., unlawfully, falsely, fraudulently and deceitfully, did conspire, combine, confederate and agree together, by divers false pretences and representations, and by divers subtle and indirect means, stratagems, devices and contrivances, to obtain, acquire and get into their hands and possession of and from *G. P. R.* divers other bills of exchange, respectively accepted by *G. P. R.*, and respectively payable at a future day, for divers large sums of money, amounting in the whole to a large &c., to wit 10,050*l.*, and to cheat and defraud *G. P. R.* of the same, and of the proceeds thereof respectively.

Eighth count. That defendants, on &c., at &c., unlawfully, falsely, fraudulently and deceitfully did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud *G. P. R.* of his moneys.

Plea: Not guilty. Issue thereon.

On the trial, before Lord *Denman* C. J., at the *Westminster* sittings after *Trinity* term 1845, among other evidence produced for the purpose of shewing the conspiracy, a warrant of attorney was offered which had been executed by *Gompertz*, and handed over to the prosecutor, *G. P. Rose*, at the time of his accepting some of the bills. The prosecutor stated that he had at first declined to give the acceptances which he then gave, but had been induced to do so by (among other things) the warrant of attorney being handed to him. The defeazance was as follows.

"Whereas the said *George Pitt Rose* hath accepted a bill for 1,000*l.*, drawn by the said *Henry Gompertz*, dated 28th *August* 1841, at three months' date, and the said *George Pitt Rose* hath also accepted four other bills for 1,000*l.* each, drawn by the said *Henry Gompertz*, respectively dated the 8th day of *September* 1841, at three months' date, and the said *George Pitt Rose* hath also accepted two other bills for 500*l.* each, drawn by the said *Henry Gompertz*, dated 8th *September* 1841, at three months' date: Be it remembered that the within written warrant of attorney is given to secure the payment of the said bills, amounting to 6,000*l.* And it is hereby agreed and declared between the said parties that no action is to be brought, or execution issued, on the judgment to be entered upon the within warrant of attorney, unless default should be made in payment of the said bills, amounting to 6,000*l.*, by the said *Henry Gompertz*, so that the said *George Pitt Rose* should, in consequence thereof, be called upon to take up or pay the said bills for 6,000*l.*, or any of them, or any part thereof; it being understood that only such part thereof as he, the said *George Pitt Rose*, should be called upon to pay the said *Henry Gompertz* should be liable to under this warrant of attorney. And it is hereby further agreed and declared that the within warrant of attorney is given to secure another bill of 2,000*l.*, drawn by *Henry Gompertz*, and accepted by the said *George Pitt Rose*, dated the 8th *September* 1841, at three months' date; and that no action is to be brought or execution to issue on the judgment to be entered up hereon except upon the same terms and conditions as are hereinbefore specified with respect to the before mentioned bills for 6,000*l.*"

This instrument was not stamped: and the counsel for

the defendants objected to its admission; but the Lord Chief Justice admitted it. It was proved that there was no such person as the *William Parker* described in the indictment. Evidence was given to shew the pretences made, and the obtaining of the acceptances; but only one conspiracy was shewn. It appeared that the prosecutor had not parted with any money, and that there was no reason to suppose that he intended to take up the acceptances. It was not shewn that the bills which he accepted were ever in his hands except for the purpose of his writing his acceptances, they having been brought to him complete, except as to his signature. The jury found a verdict of Not guilty on the first two counts of the indictment, and of Guilty on the remaining six.

In *Michaelmas* term 1845, *Peacock*, on behalf of the defendant *Gompertz*, moved for a new trial or arrest of judgment, on the grounds after stated in the argument; and *Watson*, on behalf of *Robert Witham*, produced affidavits as to matters of fact, and made a similar motion. The Court granted a rule nisi. In last term (*a*),

Cockburn shewed cause. First, as to the motion in arrest of judgment. The objection made to the third and fourth counts (which, if valid, would apply to the sixth and seventh counts also) is, that they do not state whose property the bills of exchange were: and it is contended that the indictment ought to shew all the particular circumstances of the charge. But the offence is the same, to whomsoever the bills belonged, even if they belonged to the defendants, supposing the pro-

(*a*) *November* 9th. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

secutor to have been entitled to the possession of them, and the possession to have been obtained from him by the conspiracy. In *Rex* v. —— (*a*) it was holden not to be necessary, in an indictment for a conspiracy to deprive a party of goods, to specify the goods. In *Regina* v. *Peck* (*b*) it was decided that an indictment for conspiring to defraud need not name the parties who were to be defrauded. The last four counts are further objected to as too general. They do not set out the false pretences. But in *Rex* v. *Gill* (*c*) it was holden that this was unnecessary in conspiracy. The eighth count, which is the most general, is authorised by *Rex* v. *Eccles* (*d*), which is relied upon by *Bayley* J. in *Rex* v. *Gill* (*c*). These authorities are confirmed by *Regina* v. *Kenrick* (*e*) and *Regina* v. *Blake* (*g*).

Secondly, it is objected that only one conspiracy was proved, and that therefore the verdict of Guilty, given on each of six counts, cannot be sustained. The authority for this is said to be *O'Connell* v. *The Queen* (*h*). But that case does not bear out the supposed principle: it decides only that a general judgment, proceeding upon counts some of which are bad and some good, cannot be supported. But here the question is whether a single offence may not be described in different forms by different counts; and whether, if it be so described, and proved, the jury be not bound to treat each count

(*a*) 1 *Chilt. Rep.* 698. (*b*) 9 *A. & E.* 686.

(*c*) 2 *B. & Ald.* 204.

(*d*) Note (*d*) to *Rex* v. *Turner*, 13 *East*, 230.; *S. C.* 1 *Leach, C. C.* 274. 4th ed.

(*e*) 5 *Q. B.* 49.

(*g*) 6 *Q. B.* 126. See *King* v. *The Queen*, in Exch. Ch., 7 *Q. B.* 795., reversing *Regina* v. *King*, in Q. B., 7 *Q. B.* 782.

(*h*) 11 *Cl. & Fin.* 155.

as proved. To act otherwise would clearly be to find against the evidence.

Nor, again, supposing any one count good, and others bad, will the judgment be arrested. The contrary was assumed in *O'Connell* v. *The Queen* (*a*) even by those who held, with the majority in the House of Lords, that a judgment on counts, of which some are bad, cannot be supported.

Next, it is objected that the unstamped warrant of attorney ought not to have been received in evidence. In support of this objection *Rex* v. *Smyth* (*b*) is relied upon. But there the instrument which was rejected for want of a stamp was one the validity of which was a step in the proof. That is not the case here, inasmuch as a pretended warrant of attorney would have been as effectual towards accomplishing the fraud as a real one. It is suggested that the only case in which an instrument not having the requisite stamp can be admitted is where such instrument is part of the crime charged; for which reliance is placed on Lord *Tenterden*'s language in *Rex* v. *Fowle* (*c*). But, although in that case the want of stamp is immaterial, the rule is not restricted to such cases. If an instrument be used to further the crime, the same principle must apply; *Keable* v. *Payne* (*d*), a case of a civil action where the imputed fraud was that of a third party; *Coppock* v. *Bower* (*e*).

He then argued on the affidavits.

M. D. Hill and *Peacock*, for the defendant *Gompertz*, contrà. First: as to the arrest of judgment. It was

(*a*) 11 *Cl. & Fin.* 155.
(*b*) 1 *M. & Rob.* 155, 156.; *S. C.* 5 *C. & P.* 201.
(*c*) 4 *C. & P.* 592.
(*d*) 8 *A. & E.* 555.
(*e*) 4 *M. & W.* 361.

admitted in *Regina* v. *Kenrick* (*a*), and decided in *Regina* v. *Parker* (*b*), that, in an indictment for conspiring to obtain goods from particular persons, it must be alleged whose the goods were. In the third count it appears only that the prosecutor was the acceptor of the bills: primâ facie, therefore, they were not his. He could not have maintained trover or trespass in respect of them. They never were valuable chattels in his possession; *Rex* v. *Phipoe* (*c*), where possession of the prosecutor's note of hand was obtained from him by force; the same principle must apply to an acceptance obtained by fraud. This view is confirmed by *Rex* v. *Edwards* (*d*) and *Rex* v. *Hart* (*e*). The same objection applies to the fourth, sixth and seventh counts. The last four are too general. In *Rex* v. *Gill* (*g*) the defendants were charged with conspiring to obtain and acquire "to themselves" the moneys of parties named: but *Rex* v. *Biers* (*h*) must be considered an authority against so general a form. Here the fifth and sixth counts do not even charge, as was done in *Rex* v. *Gill* (*g*), a conspiracy to obtain to the defendants. The eighth count is almost identical with the last count in *Rex* v. *Biers* (*h*), which was holden bad.

Next, the verdict, as it stands, is, that the defendants have been guilty of six different conspiracies, one only having in fact been proved. *O'Connell* v. *The Queen* (*i*) shews that the different counts must be treated as charging distinct acts: because, if all the counts could be assumed to relate to one act only, and that act were properly charged in any count, a judg-

(*a*) 5 *Q. B.* 49
(*b*) 3 *Q. B.* 292.
(*c*) 2 *Leach C. C.* 673.
(*d*) 6 *C. & P.* 521.
(*e*) 6 *C. & P.* 106.
(*g*) 2 *B. & Ald.* 204.
(*h*) 1 *A. & E.* 327.
(*i*) 11 *Cl. & Fin.* 155

ment on that count, though on others also which charged it insufficiently, would be legal. [*Coleridge* J. In *Regina* v. *O'Brian* (*a*) a defendant was found guilty of manslaughter generally, on two counts of an indictment which described a murder, in one count, as done by striking with a stick, in the other, by striking with a stone: and the Judges held that there was no ground for arresting the judgment, the mode of death being substantially the same according to each charge. That assumes that proof of one offence may support a verdict on two counts.] In *Holford* v. *Dunnett* (*b*) and *Deere* v. *Ivey* (*c*) it was held that proof of one contract will not support two counts apparently insisting on distinct contracts. In *Taylor* v. *Cole* (*d*) there were two counts in trespass, one for breaking plaintiff's house and expelling him, the other for expelling him; one entry and expulsion only was proved: and *Buller* J. said that the verdict "cannot remain as it is at present: for it is taken generally; and it is admitted that only one act of trespass was proved." *Ward* v. *Bell* (*e*) illustrates the same principle. Its application to indictments has lately been much discussed in *Campbell* v. *The Queen* (*g*). It is true that the punishment for conspiracy is discretionary: but it cannot be assumed that there will be no greater punishment for what appear to be six offences than for one. If the punishment were statutory, awarding a maximum and minimum of punishment for every conspiracy, the maximum and minimum would here be multiplied sixfold, by the multiplication of the counts.

(*a*) 1 *Denison, Cr. C.* 9.
(*b*) 7 *M. & W.* 348.
(*c*) 4 *Q. B.* 379.
(*d*) 3 *T. R.* 292.
(*e*) 1 *C. & M.* 848.; *S. C.* 3 *Tyrwh.* 904.
(*g*) Post. Judgment in Exc. Ch., *Michaelmas Vacation*, 1847.

It is no answer to this, that the Court might make the imprisonments on each contemporaneous: the jury ought not to have given the Court power to inflict the multiplied punishment for a single offence. If there were separate indictments instead of separate counts, auterfois convict might be pleaded to all but one. But, further, as to some of the counts there was no evidence. The counts alleging a conspiracy to defraud the prosecutor of moneys are not proved, no money having been obtained or sought from him. Nor, as was pointed out in argument on the first objection, is it proved that any bill was obtained from the prosecutor; all that was done was to obtain his signature; and, as he had no intention of taking the bill up, the fraud would be not on him but on the party who might give value for the acceptance; in this fraud the prosecutor would be an accomplice.

As to the stamp. Wherever the character of the instrument is immaterial, it does not signify whether it be properly stamped or not; but this does not apply where it is essential to the case that the instrument should be what it professes to be. Thus in *Rex* v. *Hall* (*a*), where a clerk was indicted for embezzling money given to him by his employer's debtor, and an unstamped receipt, given by the defendant to the debtor on receiving the money, was offered in evidence, the evidence was rejected. Here the prosecutor insisted that the fraud was accomplished by giving a warrant of attorney. Again, where the instrument, even if properly stamped, would be invalid, the want of stamp is no objection; as where the indictment is for forging the instrument itself; 2 *East's Pl. Cr.* 956, *Rex* v. *Recu-*

(*a*) 3 *Stark. N. P.* 6. 67.

list (*a*). *Coppock* v. *Bower* (*b*) turns on the same principle. So in *Keable* v. *Payne* (*c*) the cheque was invalid, being fraudulently drawn on a party who, it was known, would not honour it. But, in an indictment for burning a house with intent to defraud an insurance company, an unstamped memorandum on a policy was holden to be inadmissible; *Rex* v. *Gillson* (*d*). There the existence of the insurance depended on the memorandum. In *Rex* v. *Pooley* (*e*) it appears to have been considered that a draft drawn more than ten miles from *London* on a *London* banker, without a stamp, could not be considered a "draft" "for the payment of money," within stat. 7 *G.* 3. *c.* 50. *s.* 1., so as to subject a party employed for the post office to an indictment for felony in secreting a letter in which the draft was contained. There, unless the draft had been capable of being enforced, it was invalid. In the present case, the warrant of attorney, if stamped, would have been valid and could have been enforced; it might be stamped now, and enforced: and it was offered in evidence in the character of a warrant of attorney; the defeazance recites the acceptances. In *Regina* v. *Welch* (*g*), at the last *Warwick* assizes, a defendant was indicted for embezzlement: and, to shew that he was a clerk, and what his duties were, an unstamped appointment was offered in evidence, but rejected by *Coleridge* J. In *Buxton* v. *Cornish* (*h*) there was a claim for work and labour done ultra a written contract: and it was held that the Judge could not look

(*a*) 2 *Leach's Cr. C.* 703.
(*b*) 4 *M. & W.* 361.
(*c*) 8 *A. & E.* 555.
(*d*) 1 *Taunt.* 95. *S. C. Russ. & Ry.* 138.
(*e*) 3 *B. & P.* 311.; *S. C.* 2 *Leach's Cr. C.* 887.; *Russ. & Ry.* 12, 31.
(*g*) See p. 840. post.
(*h*) 12 *M. & W.* 426.

at the written contract, being unstamped, for the purpose even of seeing what work was and what was not comprehended in it. In *Williams* v *Gerry* (*a*) an unstamped bill of sale was held inadmissible, though it had been cancelled, and was offered in evidence only to prove that a subsequent bill of sale was bonâ fide.

Watson and *Cowling*, for the defendant *Robert Witham*, argued upon the affidavits.

Cur. adv. vult.

Lord Denman C. J. now delivered judgment.

First: there is no ground for arrest of judgment. One count, at least, is a good one. The authority of *Rex* v. *Gill* (*b*), never overruled, but founded on excellent reason (and decided by Lord *Tenterden* and *Holroyd* J.), has been always recognized, though not without regret, because that form of indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in *Rex* v. *Biers* (*c*); but even from the expressions there used, and much more from what has been said in later cases, it appears plainly that the Court has never doubted the correctness of the decision in *Rex* v. *Gill* (*b*).

Secondly: it is also said that the verdict was given on all the several counts, and that this is ground for a new trial. This novel objection was deduced from *O'Connell* v. *The Queen* (*d*), which, however, furnished no ground for it. There the judgment was held erro-

(*a*) 10 *M. & W.* 296. See *Smart* v. *Nokes*, 6 *M. & G.* 911.
(*b*) 2 *B. & Ald.* 204. (*c*) 1 *A. & E.* 327.
(*d*) 11 *Cl. & Fin.* 155.

neous, because it proceeded on several counts, some of which were not good; and the party was held to have been punished for that for which there existed no right to punish him. Here those convicted have received no sentence: and it must not be presumed that they ever will receive any in respect of any objectionable count. The distinct findings of the jury furnish the means of avoiding the objection which prevailed in *O'Connell* v. *The Queen* (*a*), if the indictment afforded any ground for raising it. The defendants having taken issue on every count, the clear duty of the Court was to see if the evidence proved every count. To the objection that the jury have found them all proved, that each charges a distinct conspiracy, that it must be taken, therefore, that as many distinct conspiracies are found as there are counts, but that in fact only one was proved, the answer is, that the evidence accorded with and proved the allegations in each: the verdict was found thereupon; and with this finding we are satisfied.

Thirdly: the reception in evidence of a warrant of attorney without a stamp was another ground of application for a new trial. This is a point of very great importance; for few frauds are committed without the intervention of written instruments made subject to the stamp duties; and yet on such occasions they are rarely stamped. The giving such an instrument as a security, on the face of it valid to an ignorant person's apprehension, but really unavailable for want of a stamp, may sometimes be one of the means by which the fraud is practised: and, where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to shew that it was part of a

(*a*) 11 *Cl. & Fin.* 155.

scheme of fraud, and so to use it for a purpose *collateral* to the object apparent upon the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible. On the other hand, if there be any allegation to the proof of which an instrument available in law is necessary, or if it be tendered as such instrument, unless, as in forgery, it be itself the subject matter of the charge, then it cannot be received unstamped, if of a nature requiring a stamp. This distinction is well known; and it is needless to cite the cases which establish it. In the present case, the fraud on the witness *Rose* was only the more complete by the instrument given to him as a security being unstamped. As proof of the principal charge, it was immaterial whether stamped or not: in effect, it was tendered, not to prove that the defendant *Gompertz* gave the witness a warrant of attorney, for which purpose it would have been inadmissible, but to confirm the witness's general story by producing a paper signed by the defendant, which, whether valid or not, the witness alleged the defendant to have given to him as a good counter security. In this point of view the validity of the instrument was wholly immaterial. On principle, therefore, the instrument was receivable. And this case is not identical with the case of *Rex* v. *Hall* (*a*), where a receipt was put in distinctly as such, to prove the receipt of the money, the very purpose for which the legislature had made it inadmissible without a stamp. In the case of *Regina* v. *Welch*, tried at the last *Warwick* assizes before my brother *Coleridge*, to prove the party charged with embezzlement a clerk, an unstamped appointment of him as such, with a salary of

(*a*) 3 *Stark. N. P. C.* 67.

200*l.* per annum, was offered, and rejected, because the relation of master and clerk was the foundation of the proceeding, and the law expressly provides that that relation shall not be proved to have been created by a written but unstamped agreement, and that such agreement without stamp shall be void and not available to any purpose. The relation, therefore, of master and servant did not exist, by reason of the want of a stamp. And we are of opinion that this warrant of attorney was admissible in the present case on both these grounds.

Fourthly: the verdict was impeached, however, as unsupported by the evidence, because the charge was of a conspiracy to obtain acceptances of and from the prosecutor, whereas he proved that the acceptances were ready written and in possession of the defendants, or some of them, and nothing was sought to be obtained but his signature. We think this substantially the same thing. It was only by the signature of the witness that the bills became complete; and his acceptance, when given, being without any consideration, was at the instant his, and in his possession. It was also urged that the entire transaction, as proved by the evidence, was at variance with the indictment, as all parties well knew that the prosecutor had no money nor could be defrauded of any; and that the real fraud was on the prosecutor's part, to the prejudice of some expected lender of the sums mentioned in the bills in return for acceptances of no value. There may be some ground for this imputation upon the prosecutor: but it will not disprove the fraud practised upon him by inducing him to accept bills without a corresponding advance of cash. Though there was little appearance of solvency in the prosecutor,

those who fraudulently induced him to incur the liability must have speculated on some pecuniary advantage from it: and, though the money could in such case only have come from his respectable friends, as he had no funds of his own, the money intended to be so procured might well be described for this purpose as his money.

Fifthly: We think, however, on comparing the affidavits of Messrs. *Witham*, father and son, with the answer to them sworn by the prosecutor, that there is sufficient ground for directing a new trial.

Rule absolute for a new trial.

Lord Denman C. J., after delivering judgment as above, added: We might perhaps see no ground for disturbing the verdict so far as it affects *Gompertz*: but into this we do not inquire; for we cannot grant a new trial as to one conspirator without granting it to all who are convicted. As, therefore, we cannot separate the defendants, there must be a new trial as to all.

Coleridge J. There would be no difficulty if some had been acquitted and some convicted. That was so in *Rex* v. *Mawbey* (*a*); and this Court held that a new trial might be granted in favour of those convicted, without disturbing the verdict as to those acquitted.

(*a*) 6 *T. R.* 619.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

X. VICTORIA.

The Judges who usually sat in Banc in this Term were,

Lord DENMAN C. J. — COLERIDGE J.
PATTESON J. — WIGHTMAN J.

BURDON and Another *against* BENTON.

Wednesday, January 13th.

In an action by drawer against acceptor of a bill of exchange, a plea that defendant accepted merely for plaintiff's accommodation, and that plaintiff did not, at any time, give any value or consideration for the acceptance, fails, if it appear that, after the bill was accepted (as alleged) for accommodation, the plaintiff gave a cross acceptance and was obliged to pay the amount, and that the bill accepted by defendant was due and unpaid at the time of action brought.

ASSUMPSIT on a bill of exchange, at two months, for 100*l.* 18*s.* 6*d.*, drawn by plaintiffs upon, and accepted by, defendant.

Plea. That defendant accepted the bill at the request of plaintiffs, and merely for their accommodation, and that plaintiffs did not at any time give to defendant, nor did defendant at any time have or receive, any value or consideration for his, the defendant's, accepting or paying the said bill. Verification.

Replication, De injuriâ. Issue thereon.

There were also money counts, and a special count applicable to the transactions after mentioned; to all of which non assumpsit and a set-off were pleaded.

On the trial, before Lord *Denman* C. J., at the *London* sittings after last *Michaelmas* term, it appeared that, about 21st *October*, 1845, the plaintiffs had placed in the hands of the defendant, who was a share-broker, some railway scrip (the value of which, at this time, the plaintiffs estimated at 25*l.*), to be disposed of for them, that, while the shares remained unsold, plaintiffs requested defendant to accept a bill drawn by them; and the defendant accepted the bill now declared upon, dated 23d *October* 1845. This acceptance was given on an agreement between the plaintiffs and defendant that, if the shares produced 100*l.*, the defendant should retire the bill; if they did not, the plaintiffs. Afterwards, in the same month of *October*, it was agreed that the plaintiffs should give the defendant their acceptance for 100*l.* for the purpose of discount: and the plaintiffs accordingly accepted a bill at two months for 100*l.*, drawn by the defendant. In the following month it was agreed that another bill should be substituted for this: and the defendant drew a bill for 100*l.* on the plaintiffs, dated *November* 28th, at two months: this the plaintiffs accepted; and the bill previously accepted by them was destroyed. The shares were still unsold: and it was at this time understood between the parties that the bill last accepted by plaintiffs should stand as a counter security to the defendant for the amount of his acceptance due in the following month, which amount he undertook to pay. The defendant parted with the bill of *November* 28th; and the plaintiffs were obliged to pay it. The defendant raised a few pounds on the

shares; but they were never sold, nor was the defendant's acceptance honoured; and the plaintiffs, in *January* 1846, commenced the present action. The Lord Chief Justice directed the jury that, under these circumstances, if proved, the second plea failed, for the bill could not be considered an accommodation bill. The jury found a verdict for the plaintiffs, with 117*l.* damages, consisting of the amount due on the bill declared upon and the sum raised by the defendant on the shares, and not paid over.

Humfrey now moved (*a*) for a new trial on the ground of misdirection. The facts are no answer to the plea. The acceptance, when given, was an accommodation acceptance: the plaintiffs were to provide for it, either by taking it up or by permitting the defendant to keep the proceeds of the shares, which however proved worthless. The subsequent facts do not alter the nature of the acceptance, though the plaintiffs might have maintained a cross action for the payment made on their own acceptance. [*Erle* J. An accommodation bill is always meant to be negotiated. *Patteson* J. Was the first bill negotiated in this case?] That does not appear. It might not be practicable. [*Erle* J. The defendant accepts a bill against the proceeds of shares. A few days afterwards the plaintiffs accept a counter-bill. That they are obliged to pay; and they then call upon the defendant to meet his own acceptance. He must say in defence, "You never gave me value during the currency of the bill." That is the meaning of the plea. If the drawer gives the acceptor value at any time during the currency of the bill, it is not an accom-

(*a*) Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Erle* Js.

modation acceptance.] That which was an accommodation acceptance at first did not cease to be so on a counter-acceptance being given afterwards: otherwise a party holding goods as indemnity against an accommodation bill would be obliged to give them up on receiving the cross bill; but *Fletcher* v. *Heath* (*a*) shews that this would not be so. [*Patteson* J. Your argument is that the issue relates to the time of giving the accommodation acceptance.] It does. [*Erle* J. The question raised by the plea is not only whether the bill was accepted for accommodation, but whether the plaintiffs at any time gave the defendant any value for it.] It never was the intention of the parties that the defendant should be sued by the plaintiffs on the first acceptance. If he could have been so sued, a holder of the first bill might have recovered against him as acceptor of that bill, and afterwards he would have remained liable, as drawer, to pay a holder of the bill accepted by the plaintiffs. The first acceptance, therefore, was an accommodation acceptance, down to the time of the bill becoming due. [*Patteson* J. You say that, if the defendant had sold the shares and not retired that bill, and the plaintiff had been compelled to pay it, he must have brought an action for money paid.] He must. It was not expressly proved that the first bill had been negotiated; but the giving of the subsequent bill makes it probable: and the clear inference is that the first acceptance was always considered an accommodation acceptance, as between the plaintiffs and defendant.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term (*January* 29th), delivered the judgment of the Court.

(*a*) 7 *B.* & *C.* 517.

After having stated the pleadings, and the material facts of the case, his Lordship proceeded as follows.

The defendant moved for a new trial, alleging that his plea was proved. We think otherwise. It was not confined to the allegation that the bill was given merely for the plaintiffs' accommodation, but went on to aver that the plaintiffs had never given any value for it. If it had been so confined, a question would have arisen on the first transaction; but we think the allegation that the plaintiffs at no time gave value for it was disproved by shewing that the plaintiffs had been compelled to pay the amount of the dishonoured bill accepted by him; *Rolfe* v. *Caslon* (*a*), *Cowley* v. *Dunlop* (*b*), *Bosanquet* v. *Dudman* (*c*), *Bolland* v. *Bygrave* (*d*), *Atwood* v. *Crowdie* (*e*).

Rule refused.

(*a*) 2 *H. Bl.* 570. (*b*) 7 *T. R.* 565.

(*c*) 1 *Stark. N. P. C.* 1.

(*d*) *Ry. & M.* 271. See *Barnett* v. *Brandão*, 6 *M. & G.* 630. 666.; *Brandão* v. *Barnett*, 3 *C. B.* 519.

(*e*) 1 *Stark N. P. C.* 483.

BROOKS *against* BOCKETT.

Thursday, January 14th.

ASSUMPSIT for non-payment of 200*l.* stated to be due for work and materials, 200*l.* for money paid, and 200*l.* on an account stated.

The clause (sect. 37) of stat. 6 & 7 *Vict. c.* 73., making attorneys' bills taxable though the business was all transacted out of Court, is retrospective; but delivery of a bill for such business, done before the act passed, is not valid unless the bill was delivered since the passing of the act, as well as one month before commencing an action.

Quære, whether an action may be commenced since the statute without delivery of a new bill, where a bill has been delivered, and the charges were taxable, before the statute.

In an action for an attorney's charges, if the plaintiff fails on the count for work and labour because no bill has been delivered, he cannot recover under a count upon an account stated, though he prove that the charges were assented to by the client.

Pleas. 1. Non assumpsit. Issue thereon. 2. That this action was commenced after the passing of a certain act of parliament &c. (6 & 7 *Vict. c.* 73.): that plaintiff, before and at the time of the making of the promise &c., was an attorney of and in the Court &c. before the Queen herself at *Westminster*, and that the said sum of money in the first count of the declaration mentioned, and every part thereof, is claimed by the plaintiff to be due to him for work and business done and transacted by plaintiff for defendant, and materials for the same provided, as the attorney and solicitor of and for the defendant, and for charges and fees in respect thereof, and not for or in respect of any cause, matter, or thing done or transacted otherwise than by the plaintiff as such attorney and solicitor: that the money paid was paid in the doing of such business &c.: and that the said account stated was and is an account stated by defendant of and concerning the said charges and fees, payments and disbursements, in this plea and in the declaration mentioned, and in relation thereto, and not otherwise or in any manner touching, concerning or relating to any cause, matter or thing other than in this plea aforesaid. And that no bill of the said charges &c., or of any part thereof respectively, subscribed with the proper hand of the plaintiff, or enclosed in, or accompanied by, a letter so subscribed, referring to such bill, was delivered by plaintiff to defendant (he the defendant being the party to be charged therewith), or sent by the post to or left for him at his counting house, office of business, dwellinghouse or last known place of abode, one month before the commencement of this suit, or ever delivered, sent to or left for him the defendant in any manner whatever, as by the said statute is required. Verification.

Replication to plea 2. "That, more than a month before the commencement of this suit, to wit on the 5th day of *August* 1840," plaintiff left for defendant at his the defendant's then office of business, situate &c., "a bill of such fees, charges and disbursements in the second plea mentioned, accompanied by a letter, subscribed with the proper hand of the plaintiff, referring to such bill." Conclusion to the country. Issue thereon.

On the trial, before *Coleridge* J., at the sittings in *Middlesex* during *Easter* term, 1844, it appeared that the charges in question related wholly to conveyancing business, done in 1839 and 1840: that in the latter year the plaintiff delivered a bill of costs, unsigned, but inclosed in a letter signed by him, referring to the bill: and that the present action was commenced in *January* 1844, after the passing of stat. 6 & 7 *Vict.* c. 73. (*a*). It was contended, for the plaintiff, that, as sect. 37 of the statute makes an attorney's bill taxable though no part of the business shall have been transacted in any court of law or equity, the bill in question ought to have been delivered after the passing of the act, so as to give the defendant an opportunity of having it taxed before proceedings were taken to enforce payment. The learned Judge reserved leave to move to enter a nonsuit, or a verdict for the defendant on the second issue: and a verdict was found for the plaintiff, damages 73*l.* 14*s.*

Watson, in the ensuing term, obtained a rule to shew cause why a verdict should not be entered for the de-

(*a*) "For consolidating and amending several of the laws relating to attorneys and solicitors practising in *England* and *Wales*." Royal Assent, 22d *August*, 1843.

fendant on the second issue, on the ground above stated, or why judgment should not be arrested because the replication did not shew that the bill was delivered after the passing of the act.

Platt, in the same term, obtained a rule to shew cause why, if a verdict were entered for the defendant, judgment should not be given for the plaintiff non obstante veredicto, because the plea did not shew that the bill was for charges taxable as well before as since the act: or, if it was for charges taxable only under the act, that the work to which they related had been done since the act passed.

In *Trinity* vacation, 1845 (*a*),

Jervis and *Peacock* shewed cause against the defendant's rule and supported that of the plaintiff. Stat. 6 & 7 *Vict. c.* 73. *s.* 1. enacts that stat. 2 *G.* 2. *c.* 23., and other acts relating to attorneys, shall be repealed "except so far as relates to any matters or things done at any time before the passing of this act, all which matters and things shall be and remain good, valid, and effectual, to all intents and purposes whatsoever, as if this act had not passed." But, if sect. 37 is nevertheless retrospective for the purpose of subjecting to taxation bills for business done before the act passed, it must also operate retrospectively in making the delivery of a bill before the act available in respect of charges to be taxed after it. Were this not so, a party who had used all possible precaution in delivering a bill while

(*a*) *June* 14th and 21st. Before Lord *Denman* C. J., *Williams* and *Coleridge* Js. *Williams* J. left the Court during the argument on the second day.

the law was yet unaltered might be debarred of his action by the Statute of Limitations before a month could elapse from the delivery of a bill under the new statute: and a bill, though it had been delivered nearly twelve months before the act of *Victoria* passed, would not be exempt from taxation by lapse of time, under sect. 37, till the end of a new period of twelve months. According to the view taken on the other side, even a verdict obtained before the statute would not bring the bill within the exemption provided in that case by sect. 37. It would be a forced and unfair construction to hold that proceedings commenced before the statute must all begin de novo. This plea, if otherwise good, is no answer on the account stated, more than it would be to an action on a promissory note given in respect of an attorney's charges. "An account stated alters the nature of the debt:" 2 *Phill. Ev.* 126. 7th ed. But the plea is bad, as being too general to raise the defence. It does not shew non-delivery of a bill required by stat. 2 *G.* 2. *c.* 23. *s.* 23.; for the words are "that this action was commenced after the passing of" stat. 6 & 7 *Vict. c.* 73., and "that no bill" &c. "was delivered" "one month before the commencement of this suit, or ever delivered" &c., "as by the said statute is required." That means that the plaintiff did not deliver a bill required by the last mentioned act; not "such a bill" as that act requires, for to allege so would be referring a question of law to the jury. And, if a non-delivery under the present act is insisted upon, the plea ought to have shewn that the items were such as would require a delivery for the purpose of taxation under this act though a bill might have been delivered before the act passed and

when the items were not taxable. The replication, if the plea requires an answer, is sufficient. If the date there given is material, the plaintiff has brought himself within the protection of the act: if it is not, the objection taken was available only on special demurrer.

Watson and *Gurney*, contrà. The true issue on the defendant's side is, that the plaintiff has delivered no bill having the requisites mentioned in the statute; that is, properly subscribed, or accompanied by and referred to in a letter so subscribed, and in other respects regular, according to the construction which the Courts have given to the acts of parliament on this subject. So in *Hickes* v. *Cracknell* (*a*), where, in debt on an annuity bond, it was pleaded that the deed was made after the passing of stat. 53 *G.* 3. *c.* 141., and that "no memorial of the said writing, containing the names of all the witnesses thereto, and the date" &c., "and the names of all the parties" &c., "was enrolled in the High Court of Chancery, according to the directions of the said act of parliament," whereby the deed was null &c., *Parke* B. said: "I have not the least doubt the meaning of the plea is — not that there was no memorial at all — but that there was not such a memorial as the act of parliament requires — no valid memorial:" and the Court so held. If the meaning of the plea is not that relied upon by the defendant, the replication is clearly imperfect, and the issue upon it nugatory, and there must be judgment non obstante veredicto; and, as there is no other issue upon which damages are assessed, no such difficulty arises as in *Lewin* v. *Ed-*

(*a*) 3 *M.* & *W.* 72. See *Dresser* v. *Stansfield*, 14 *M.* & *W.* 822.

wards (*a*), where the damages were assessed generally. The real question is upon the meaning of stat. 6 & 7 *Vict.* *c.* 73. *s.* 37. That clause introduces two new provisions, material to the present case: that a conveyancing bill may be taxed; and that a bill not signed by the attorney's own hand shall be sufficient, if accompanied, and referred to, by a letter so signed. In other respects the intention (as appears by sect. 1) is to keep things as they would have been if the statute had not passed: matters transacted before that time are exempted from change, and continued in force. But here nothing had been done which the statute could keep alive: there had been no signed bill, and no business subject to taxation. Conveyancing business had been done before the statute, but, legally, no bill delivered. When the statute passed, delivery of a bill in respect of the past business became necessary to the bringing of an action; for sect. 37 operates retrospectively; *Binns* v. *Hey* (*b*). The enactment, that from and after the passing of this act no attorney shall commence any action for the recovery of fees and charges until the expiration of one month after he shall have delivered a bill, intimates that a delivery after the statute was contemplated in all cases; but especially in that of a bill made taxable by the statute itself, and which was not so before. Clearly the period of twelve months, after which a bill is not to be taxable except under special circumstances, is intended to commence after the statute. The same reasonable view which is now contended for, as to the prospective or retrospective operation of words, was adopted in *Benjamin* v. *Belcher* (*c*), when the Court had

(*a*) 9 *M. & W.* 720. (*b*) 1 *Dowl. & L.* 661.
(*c*) 11 *A. & E.* 350, 367., et seq.

to construe sect. 127 of the Bankrupt act, 6 *G.* 4. *c.* 16. As to the form of the plea; the words comprehend the real defence, and point it out sufficiently, following the language of stat. 6 & 7 *Vict. c.* 73. *s.* 37.; and no other form is suggested in which it could have been shaped. It is contended that the plea does not answer the count on an account stated; for that by statement of an account the nature of the debt is altered, and this count, therefore, is not to be considered as proceeding upon the original claim for fees and disbursements. The dictum cited on that point rests on cases decided when the action on an account stated was viewed with more exactness than it has been in later times. And at all events, since the passing of stat. 2 *G.* 2. *c.* 23., it could not be said that by the mere assent of a client to his attorney's charges the nature of the debt was changed, and the bill no longer taxable because it was the subject of an account stated. [Lord *Denman* C. J. If that were so there would be very few declarations on attorney's bills; for it would be easy to shew that the client looked at the bill and assented; and the action would be brought on the account stated. But the statute cannot be so dispensed with.] Here, there was in fact no proof of an account stated; for the defendant always disputed the charges. The verdict on the first plea ought to have been entered for the plaintiff as to the first two counts, and for the defendant as to the third. Then, the second plea being divisible (*Vivian* v. *Jenkin* (*a*), *Monkman* v. *Shepherdson* (*b*)), the question whether it answered the counts admitted to have direct reference to the bill would have been properly raised.

Cur. adv. vult.

(*a*) 3 *A. & E.* 741. (*b*) 11 *A. & E.* 411.

Lord DENMAN C. J. now delivered judgment.

This was an application on the part of the defendant to be allowed to enter the verdict for himself on the second plea, or to arrest the judgment. The action was an attorney's for work and labour and on an account stated: the second plea denied the delivery of any bill as by the statute required: the replication alleged simply the delivery of a bill, omitting any notice of the words in the plea "as by the said statute is required." The facts were that the work was entirely conveyancing; but a bill had been sent, not signed, but inclosed and referred to in a letter signed by the plaintiff, before the passing of stat. 6 & 7 *Vict. c.* 73.; and the plaintiff in the first place contended that the plea itself was bad for not alleging that the work had been done since the passing of the act, or that it was work the charges for which were taxable before the act passed. And, if this were so, no doubt the defendant's rule must fall to the ground. But, since this argument, in *Trinity* term last, in *Scadding* v. *Eyles* (*a*), we decided that in this respect the statute 6 & 7 *Vict. c.* 73. was retrospective in its operation. In that case it did not appear on the record that the charges were of a nature to have been taxable before the act passed; and no distinction was attempted at the bar, or sanctioned by the Court, on that ground.

It was then contended, for the plaintiff, that, if the statute required a delivery of a bill where the charges were incurred before the act passed, it must also be satisfied by a delivery, such as the act required, before the passing of the act; and it was urged that, unless this were held, an attorney might in substance have performed

(*a*) P. 858, post.

all that was necessary under the act, yet the Statute of Limitations might intervene, and entirely bar him of his remedy, if, after the act passed, he was bound to deliver his bill anew and wait a month before he could commence his action. And this in a certain sense is undoubtedly true: but it would be equally true, and equally inconvenient, if the attorney, where his demand was only for conveyancing, had delivered no bill before the act passed, but had waited to within less than a month of the expiration of six years from the date of his demand; then he would be barred, and by no default of his own, for no statute has before required him to deliver his bill and wait a month.

The question then is upon the construction of the 37th section. The words are that "from and after the passing of this act no attorney" &c. "*shall* commence or maintain any action or suit for the recovery of any fees, charges," &c. "for any business done by such attorney" "until the expiration of one month after such attorney" "*shall have delivered* unto the party to be charged therewith, or sent" &c. "a bill." The words "shall have delivered" are certainly very general; and there has been a literal compliance with them; but it must be considered what is the purpose for which the statute does now, as the former statute did, require a delivery; that a taxation may be had, if the party charged desires it, within one month. Now the delivery here relied on could not have had that effect: the attorney was not bound to wait a month after it before he commenced his action; nor could the party charged procure a taxation during that period. However, therefore, we might hold as to the effect of a delivery before the statute in the case of a bill then

taxable, as to which we say nothing, we should be entirely defeating the retrospective operation of the 37th section if we were to hold such delivery effectual in the case of a conveyancing bill. It may be that in the case of a taxable bill the delivery may come within the operation of the saving in the 1st section, as being a thing done before the passing of the act: the delivery here cannot be within that saving, because it was not within or done under any of the repealed statutes. If the 37th section applies, as we think it does, to a bill for charges incurred in conveyancing before the statute passed, there has been no delivery here which satisfies its requisitions.

But then it was said by the plaintiff that the plea was bad, because it was no answer to the count on the account stated, to which, as well as to the first, it was pleaded. The same point was made in *Scadding* v. *Eyles* (*a*), before referred to. If it could be maintained, the consequence would be that the slightest admission by the client would defeat the salutary provisions of the statute, and dispense with taxation. This objection cannot prevail: and the rule must be absolute to enter the verdict for the defendant as prayed.

Rule absolute to enter verdict for defendant (*b*).

(*a*) Post, p. 858.

(*b*) See the next case.

The following case was postponed in order that it might accompany *Brooks* v. *Bockett*, antè, p. 847.

[*Friday*, *June* 5th, 1846.]

Scadding *against* Eyles.

A plea, to an action of assumpsit, that the action is for an attorney's charges, and was brought since the passing of stat. 6 & 7 *Vict.* c. 73., and that no bill was delivered, is good, though it do not shew that the charges are such as were taxable before the statute, or that the business was done since. So held on special demurrer.

To a count on an account stated, it is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered.

In such pleas, it is a sufficient confession to state that the action is brought to recover the amount of charges "by the plaintiff *claimed and demanded* to be due to him from the defendant for work done" &c., "and that the work was done by plaintiff for defendant as his attorney and not otherwise." So held on special demurrer.

ASSUMPSIT. The declaration claimed 10*l.* for work done and materials provided by plaintiff for defendant at his request; and 10*l.* on an account stated.

Pleas. 1. Non assumpsit. Issue thereon.

2. To the 1st count. That this action was commenced after the coming into operation of stat. 6 & 7 *Vict.* *c.* 73., "and is prosecuted" "solely to recover from the said defendant the amount of certain fees and charges by the plaintiff claimed and demanded to be due to him from the defendant for work done and materials for the same provided by the plaintiff for the defendant, and that the same were respectively done and provided by the plaintiff as the attorney and solicitor of and for the defendant, and not otherwise. And" "that the plaintiff did not, one calendar month, or at any time, before the commencement of this suit, deliver unto the defendant" &c., "or send" &c. "a bill of such fees and charges, subscribed" &c., "or inclosed in or accompanied by a letter" &c., "pursuant to the statute in such case" &c., or any bill whatever. Verification.

3. To the last count. That the account therein mentioned to have been stated between plaintiff and defendant "was so stated solely of and concerning the said debt and cause and causes of action in the first count and last preceding plea mentioned, and not otherwise. And" "that this action, so far as relates to the said first count, is prosecuted by the plaintiff against the defendant to recover the amount of certain fees and charges from the defendant claimed by the plaintiff for and in respect of the said several matters and things, cause and causes, in the said first count and the last preceding plea mentioned, and not otherwise, and was commenced after" the coming into operation of stat. 6 & 7 *Vict. c.* 73. And that plaintiff did not deliver a bill &c. (as before). Verification.

Demurrer to the 2d plea, assigning as causes, that the plea does not sufficiently confess the cause of action &c., but merely states that the action is prosecuted to recover fees &c. *claimed and demanded* to be due &c. for work done and materials provided &c., and that the same were respectively done and provided by plaintiff as the attorney and solicitor of and for defendant, without stating or confessing that they were done &c. at his request or on his retainer, or under any circumstances which would render him liable to pay any fees &c. for such work and materials, and without stating &c. that defendant promised plaintiff to pay him for the same, or was indebted to him for the same; and that the plea is no answer to that part of the 1st count which relates to the price and value of the materials, inasmuch as it does not shew that the materials were supplied under such circumstances as would preclude

the plaintiff from recovering the price and value thereof without delivering &c. such bill as in the second plea mentioned. Also that the plea does not shew that the work and materials were done or supplied in *England* or *Wales*, or in *England* and *Wales* by plaintiff as an attorney and solicitor or an attorney or solicitor practising in *England* or *Wales*. Joinder.

Demurrer to plea 3, on the ground that it does not shew that the work or materials in respect of which the account was stated were done or provided by plaintiff as an attorney and solicitor, or attorney or solicitor practising in *England* or *Wales*. Joinder.

Peacock for the plaintiff. The words "fees and charges" "claimed and demanded to be due," in the second plea, are not a sufficient confession; *Gould* v. *Lasbury* (*a*). [Lord *Denman* C. J. It has been held that a reference to the "supposed debt" is a virtual admission (*b*); but a reference to "the supposed debt," "if any such there be," is not.] The latter point was decided in *Margetts* v. *Bays* (*c*). [*Wightman* J. Is not "claimed and demanded" as consistent with an admission as "supposed"?] There is no actual acknowledgment that the fees and charges were due for work done. The language ought to be such that, if the plea fails to avoid, judgment may be given on the confession. [*Patteson* J. The plea states that the business was done by the plaintiff as an attorney, but does not state that it was business done in court.] That is clearly an

(*a*) 1 *Cro. M. & R.* 254.; *S. C.* 4 *Tyr.* 863. On special demurrer.
(*b*) *Gale* v. *Capern*, 1 *A. & E.* 102. After verdict.
(*c*) 4 *A. & E.* 489. On special demurrer. See *Wise* v. *Hodsoll*, 11 *A. & E.* 816.

objection, the plea not shewing that the business was done since the statute. If it was done before, and not in Court, delivery of a bill would not be necessary. The contrary supposition would lead to great injustice; for an action in respect of conveyancing charges might be barred by the Statute of Limitations before a month had elapsed from the passing of the act, though the plaintiff had been guilty of no laches in not delivering a bill before, when the law did not require it. [Lord *Denman* C. J. A party who had waited more than five years and eleven months would not have much to complain of; and the case is not likely to happen.] The third plea admits a statement of account; but, where the account between attorney and client has been settled without taxation, the nature of the debt is changed, and the objection that no bill was delivered is no longer applicable; *Hooper* v. *Till* (*a*). A statement of account is not a mere admission, though an admission is evidence of an account stated. [*Patteson* J. If it be held that, in an action for an attorney's charges, when the defendant takes issue on the account stated, the plaintiff may prove his case by an admission, the rule as to taxation is defeated. Lord *Denman* C. J. The act of parliament, so far, becomes useless.] The admission would be evidence merely. The defendant might disprove the stating of an account. But it cannot be said that, if, in point of fact, the accounts had been cast up, and a balance struck, a defendant might reopen them if one item related to law proceedings. (He also noticed the omission to state that the work was done &c. in *England* or *Wales*).

(*a*) 1 *Doug.* 198.

Lush, contrà. The argument on the account stated, if successful, would virtually repeal the statute as to taxation. Whatever may have been the result in ordinary cases, when parties have sat down together and settled an account (a state of things not admitted on these pleadings, since the delivery of a bill is denied), the legislature has made express provision for the case of an attorney's bill, and no assumption can be made which the statute does not sanction. [Lord *Denman* C. J. I think there can be no doubt that the legislature intended to have these bills taxable and examinable in all cases. But what do you say to the first point?] If a party does not in any form deny, he confesses. In a plea of payment, tender or set-off, it is never thought necessary to say in terms, "the defendant admits that he once owed the money." The words "if any" are inconsistent with an admission, because they do not admit the fact, even for the purpose of the action. But "supposed" means "alleged," and does not suggest any doubt of the fact; for which reason it was held unobjectionable in *Eavestaff* v. *Russell* (*a*); and the words "claimed and demanded" are equivalent to supposed. [Lord *Denman* C. J. We think so.]

Per Curiam (*b*),

Judgment for defendant.

(*a*) 10 *M. & W.* 365. On special demurrer.

(*b*) Lord *Denman* C. J., *Patteson* and *Williams* Js.

Doe, on the demise of GOODY, *against* MARY CARTER.

Thursday, January 14th.

EJECTMENT for a cottage, garden &c., in *Essex*. Demise, 8th *January* 1845.

On the trial, before *Coleridge* J., at the *Essex* Summer assizes, 1845, it appeared that the defendant was the widow of *John Carter*, who died in 1834, being then occupier of the premises, which he had held, as after mentioned, for a period short of twenty one years; and the defendant had occupied them ever since. The other material facts (as stated in the judgment of the Court delivered this day) were as follows. *Robert Carter*, the father of *John*, purchased the premises (amongst others) from one *Havens*, and was let into possession; but, as he did not pay all the purchase money, no conveyance was executed till the 14th *December* 1824, some years after the purchase. In the meantime the father had let his son *John*, the husband of the defendant, into possession of part of the premises as tenant at will (*a*) without paying any rent. The father afterwards mortgaged the whole, on 23d *March*, 1829, for a term of years, now

R. C., the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will. The son occupied, and built a cottage on, the land. Afterwards *R. C.* took a conveyance from the vendor; and, some time after, he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty one years of his entry. The son's widow continued to occupy till the expiration of twenty one years from her husband's entry.

Held, that an action of ejectment afterwards brought against her was barred by stat. 3 & 4 *W.* 4. *c.* 27. *ss.* 2, 7. For that the tenancy at will was not determined by the father's taking a conveyance: and that, if it had, in point of law, been so determined by that event, or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will: and the tenancy, altogether, had continued more than twenty years from the end of the first year.

(*a*) After being let into possession, and before the conveyance in 1824, *John Carter* built the cottage (in part at least) with his own materials: and it was contended, in shewing cause against the after mentioned rule, that this gave him an equitable interest, higher than that of a mere tenant at will: but the Court thought that the case, as reported by the learned Judge, did not raise this question.

vested in the lessor of the plaintiff. The learned Judge directed the jury that, if they believed *John Carter*, the son, to have entered as tenant at will more than twenty one years before the day of the demise laid in the declaration, this action was barred by stat. 3 & 4 *W.* 4. *c.* 27 (*a*). Verdict for defendant. *Lush*, in the ensuing term, obtained a rule nisi for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence. In *Trinity* vacation, 1846 (*b*),

Gurney shewed cause. It is assumed on the other side that *John Carter* always held as tenant at will to his father, and that that tenancy was determined on certain occasions, so that it never lasted for an entire period which would now make up twenty one years. But, first, assuming the son to have come in as tenant at will, he and the defendant have held continually for twenty years from the expiration of one year next after the commencement of the tenancy. [*Patteson* J. The lessor of the plaintiff represents a mortgagee.] The defendant does not stand upon the right of a mortgagor. If a tenancy at will originally subsisted between the son and father, it could not be determined by the father's taking a formal conveyance. Nor was it determined by the mortgage in 1829, no notice having been given to the tenant on the mortgagee's part to pay the future rents to him, as in *Waddilove* v. *Barnett* (*c*). If the mortgage, without such notice, had any effect, it was only that the tenancy, from that time, became a tenancy by sufferance; *Com. Dig. Estates* (I 1.); which would not prevent the statute from taking effect at the end of the twenty one years;

(*a*) Sects. 2. 7.

(*b*) *June* 25th. Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

(*c*) 2 *New Ca.* 538. 542.

Doe dem. Bennett v. *Turner* (*a*). There was no evidence of any new tenancy being created, at this or any other period. No alteration took place on the death of *John Carter*; and his holding was continued by his widow. But, further, it cannot be said that *John Carter* ever was tenant at will; for, when his tenancy under his father commenced, the father himself held only at will; and a tenant at will cannot create an estate at will under him. If that be so, the case is, simply, that the defendant and her husband have had a twenty years' possession without recognition of a title in any other person. [*Patteson* J. A tenant at will cannot, as against the landlord to whom he is tenant, constitute another person tenant at will; but he can make a tenant at will as against himself. Lord *Denman* C. J. We must take it here that the case was such.]

He also argued as to the weight of evidence.

Lush, contrà. The first material question is, in what character the son occupied. He did not enter as a trespasser; and the only conclusion that can be drawn from the evidence is that he came in, and held, as tenant at will. A tenant at will may create a tenancy at will available as against himself. Then the father, by taking a conveyance in 1824, determined the will; and so the period of twenty years was broken, according to the doctrine of *Doe dem. Bennett* v. *Turner* (*a*), which directly applies to the present case. [*Patteson* J. There an act was done by the landlord which had a direct operation upon the tenant. Suppose a mortgagor pays off the mortgage and takes a reconveyance: I do not see that a tenancy

(*a*) 7 *M. & W.* 226. 334. See *Turner* v. *Doe dem. Bennett*, in Exch. Ch., 9 *M. & W.* 643. Also *Doe dem. Dayman* v. *Moore*, antè, p. 555.

at will under him is affected by that. Or suppose a lessee purchases the reversion.] It is a different estate in each case. [Lord *Denman* C. J. There is no change, except as between the parties to the conveyance.] In *Disdale* v. *Iles* (*a*) it was held that a tenancy at will was determined at once by the grant of a lease for years to a third party, though the entry by the new lessee under the lease was deferred. Again, if a tenancy at will subsisted in 1829, the will was determined by the mortgage, and a new tenancy then created. [*Patteson* J. The defendant's counsel contends that, if the tenancy at will was at any time determined, a tenancy by sufferance commenced, which might last for ever, and in fact never was determined; and, so, that the period of twenty years was unbroken.] The jury should have been required to find what, in point of fact, the character of the son's tenancy was, down to 1829, and afterwards. In *Doe dem. Bennett* v. *Turner* (*b*) the character of the tenancy was found as a fact by the jury, and the Court directed a new trial in order that a jury might say whether the tenancy, from 1827, was at will or at sufferance. [*Patteson* J. It does not appear that you desired to have any question put to the jury as to the nature of the tenancy.] Secondly, it is material to ascertain the character in which *John Carter*'s widow held after his decease. Whether the previous tenancy was at will or by sufferance, his death put an end to it (*c*). [*Patteson* J. No notice to quit was given.] The widow was not the representative of the late tenant. It did not appear that she ever took out administration, or that she paid

(*a*) 2 *Lev.* 88.

(*b*) 7 *M. & W.* 226.

(*c*) *Lush*, in moving for the rule nisi, cited *Doe dem. Stanway* v. *Rock*, *Carr. & M.* 549. 553., on this point. See *Doe dem. Burrell* v. *Perkins*, 3 *M. & S.* 271., and *Doe dem. Cadwallader* v. *Price*, 16 *M. & W.* 603. 610.

rent. If a tenancy at sufferance had existed, it was not transmissible. If a continuous tenancy at will was supposed, it should have been put to the jury to say whether or not the widow's occupation had that character. [*Patteson* J. I doubt if there can now be a continuous tenancy at will. There may be a new one every year. Stat. 3 & 4 *W.* 4. *c.* 27. *s.* 7. considers tenancy at will as determining at the end of one year after its commencement.] That is for the purpose of the twenty years' limitation. [*Patteson* J. It seems to be for all purposes.]

Cur. adv. vult.

Lord Denman C. J. now delivered the judgment of the Court.

This rule was moved for on two grounds: misdirection, and that the verdict was against evidence. As to the latter, we think that there was abundant evidence to shew that the defendant's husband *John Carter* entered into possession of all the premises sought to be recovered, as tenant at will to his father, more than twenty one years before the bringing of this ejectment, which in truth was the only question for the jury.

The case, therefore, depends on the question whether the learned Judge misdirected the jury. The facts were: (his Lordship here stated them as they appear in p. 863., antè). Under these circumstances, it was contended for the lessor of the plaintiff that, as the father was himself tenant at will to *Havens* till 14th *December* 1824, when that tenancy was determined by the execution of the conveyance, the tenancy at will subsisting between the father and son was determined at the same time. We do not think that consequence followed, but are of opinion that the conveyance to the father had no operation on the tenancy at will between

him and the son. Again, it was contended that the mortgage by the father in 1829 operated as a determination of the will. Assuming this to be so, still the son would thereby become tenant by sufferance, and the twenty years under the late statute 3 & 4 *W.* 4. *c.* 27., having begun to run long before, would continue to run unless a new tenancy at will or for some other term were created; *Doe dem Bennett* v. *Turner* (*a*), *Turner* v. *Doe dem. Bennett* (*b*): and, indeed, the same observation would apply if the conveyance in 1824 were treated as a determination of the will. Now there was no evidence in this case from which the jury could draw the conclusion that a new tenancy between the father and the son had been created at any time within twenty years before the bringing of this ejectment: and, therefore, the determination of the will of the father either in 1824 or in 1829 is not, in truth, material.

Upon the whole, we are of opinion that the learned Judge was right in telling the jury that, if they believed the son to have entered as tenant at will more than twenty one years before the 8th of *January* 1845 (the day of the demise in the declaration of ejectment), the statute 3 & 4 *W.* 4. *c.* 27. was a bar to the action; and that the jury were right in finding that he did so enter. The rule for a new trial must, therefore, be discharged.

Rule discharged (*c*).

(*a*) 7 *M.* & *W.* 226. (*b*) 9 *M.* & *W.* 643.

(*c*) See *Doe dem. Carter* v. *Barnard*, decided in *Trinity* vacation (*July* 5th) 1849. Post. In that case *Mary Carter*, having been dispossessed, brought ejectment, and proved the occupation by her husband and herself successively, as in the above case, relying upon her own occupation for thirteen years from her husband's death, as proof of title. But the Court held that the husband's possession, as proved (though for only eighteen years), shewed, primâ facie, a seisin in fee, and that the plaintiff's title was therefore defeated, it appearing by her case that he had children surviving. The present decision was not impeached.

BLANCHARD *against* DE LA CROUÉE and Another.

Thursday, January 14th.

When a cause has been removed from an inferior court by habeas corpus at the defendant's instance, and no further step taken on either side for a year, the plaintiff may apply ex parte for a procedendo to issue unless bail in this Court be given within four days. And the bail below cannot move to set aside such procedendo when issued, until they or the defendant have put in bail in this Court.

THIS was an action of debt, commenced, *November* 1844, by foreign attachment out of the Lord Mayor's Court of *London*. In *December* 1844, bail were put in; and the plaintiff afterwards declared, and the defendants pleaded Nil debent. On *January* 20th 1845, the defendants removed the cause into this Court by habeas corpus, returnable immediately. On 29th *April* 1846, no step having, in the meanwhile, been taken on either side, the plaintiff obtained a rule, ex parte, for a procedendo, unless bail, in this Court, should be put in within four days. Notice of such rule was served on the defendants, who declined to put in bail, giving the plaintiff notice that they considered the cause out of Court. On *May* 30th, a procedendo issued. The defendants took out a summons to shew cause before a Judge at chambers why the procedendo should not be set aside for irregularity. *Patteson* J., on the hearing, referred the case to the full Court; and, in last *Michaelmas* term (*a*),

Wise, on behalf of the bail, moved for a rule to shew cause why the procedendo should not be set aside. The question is, whether, in a case like this, a plaintiff has unlimited time for requiring the defendant to put in bail in the superior Court. The plaintiff should have

(*a*) *November* 7th, 1846. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

moved earlier for a procedendo; and should, at least, have given notice to the bail in the Lord Mayor's Court that he intended to proceed with the suit. There is no direct authority on this point, in a case from the Lord Mayor's Court: but it is ordered, by *Reg. Gen. Hil.* 2 *W.* 4. (*a*), I. 35., that "a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable;" and that applies to cases removed by habeas corpus from an inferior Court as well as to others, the only difference between the two classes being that, in cases so removed, the defendant cannot non-pros the plaintiff after two terms, but must wait the expiration of the year; *Norrish* v. *Richards* (*b*). And *Sykes* v. *Bauwens* (*c*) shews that, when the plaintiff is out of Court by not declaring, the bail may always claim to be exonerated on that ground. [*Wightman* J. Have they power to oblige the plaintiff to declare in this Court?] They have not; nor is he bound to declare. On a habeas corpus no day in Court is given to the parties, and the plaintiff is not obliged to follow the defendant into the superior Court; *Clack* v. *Dixon* (*d*). [*Erle* J. By *Reg. Gen. Hil.* 2 *W.* 4. (*a*), I. 37., "where a cause has been removed from an inferior Court, the rule to declare may be given within four days after the end of the term in which the writ is returned."] That rule, and rule I. 38., certainly contemplate a rule to declare, in some cases of removal from inferior Courts. [*Erle* J. According to the practice, can you be heard for any purpose in this Court till you have put in and perfected bail? You are not in Court till then. *Wightman* J. The plaintiff could not have declared

(*a*) 3 *B. & Ad.* 379.
(*b*) 3 *A. & E.* 733.
(*c*) 2 *New Rep.* 404.
(*d*) 3 *M. & S.* 93.

against you without waiving bail in this Court. *Coleridge* J. You wish to get rid of your liability below. The regular course, then, is to put in bail here.] It is the fault of the principal that that has not been done. If the course here taken could prevail, the bail below might suffer by a collusion between the plaintiff and defendant. And the plaintiff here has treated the cause as being in Court, by moving for a procedendo. [*Erle* J. The defendants are not in Court: and because they have not brought themselves there the plaintiff wishes to get the cause back. The defendants, if they had taken the proper course, might have terminated the cause by the usual four-day rule: and, if they did not take that course, the bail might have done so. *Wightman* J. Would not the defendants' omission have been ground for an application to the Court below?] Not after the removal by habeas corpus. [*Wightman* J. The recognizance of bail remains below till bail are put in here.] That applications like the present, for the relief of bail, are entertained by the Courts, appears from *Lawes* v. *Hutchinson* (*a*) and *Wiggins* v. *Stephens* (*b*). There is, indeed, one case, *Clarke* v. *Harbin* (*c*), which seems adverse to the present application, bail above not

(*a*) 1 *Cro. M. & R.* 766.; *S. C.* 5 *Tyr.* 286. (*b*) 5 *East*, 533.

(*c*) *Barnes*, 90. *Hil.* 16 *G.* 2. (1743). "*May* 20th 1742, a writ of *Ha. cor.* returnable *immediatè*, was lodged at the Palace Court, to remove a plaint from thence into this Court; and nothing further was done till 20th *November* last term, when plaintiff served defendant with a rule to put in bail. Defendant insisted, that plaintiff should have served such rule within two terms after the *Ha. cor.* brought, and was now too late. The Court held, that if defendant had put in bail upon his *Ha. cor.* without staying to be forwarded by a rule for bail, and plaintiff had not declared within two terms after bail put in, the cause would have been out of Court, but the rule for bail is not limited to any particular time. Rule to shew cause why proceedings should not be stayed, was discharged."

having been put in. [*Wightman* J. You might have put in bail, and then ruled the plaintiff to declare.] The defendant, who does not know whether or not the plaintiff is going on, ought not to be at the trouble of obtaining bail. [*Wightman* J. Under the former practice, bail to the sheriff were not discharged merely because the plaintiff did not declare; and, if he had declared before bail were put in above, he would have waived such bail. You might have put in bail here, and then made any application to relieve the bail in the Lord Mayor's Court.] Parties might be satisfied to be bail there, but not willing to become bail above. [*Wightman* J. Then they may remain bail in the Lord Mayor's Court.] At least, the plaintiff ought to have given a term's notice of the intention to proceed, instead of taking out an ex parte rule for a procedendo: cause might have been shewn to the Court (as on the ground of collusion) against a procedendo.

Cur. adv. vult.

The case being now mentioned by counsel,

Lord DENMAN C. J. answered: It is enough to say that we think the rule cannot be granted. We have looked into the practice of the Court; and that is our opinion.

Rule refused.

BELCHER and Others *against* GUMMOW.

Tuesday, January 19th.

An act of bankruptcy, under stat. 6 *G.* 4. *c.* 16. *s.* 3., by procuring the party's own goods to be taken in execution is not committed till the actual seizure.

And, upon such seizure, the commission of the act of bankruptcy is not carried back by relation to any earlier period.

ASSUMPSIT. The declaration recited that the now defendant, in an action brought by him against *Joseph Cundy*, obtained judgment for a debt of 4000*l.* and 7*l.* 12*s.* damages; and that defendant, for having execution &c., sued out a fi. fa. directed to the sheriff of *Middlesex*, indorsed to levy 707*l.* &c.; which writ was delivered &c.; and by virtue of which writ the sheriff, on &c., took certain goods of *Cundy* in execution; and thereupon a discourse was had between the now plaintiff and now defendant, wherein a question arose, viz. Whether the said goods so taken in execution were the goods and chattels of the now plaintiffs as assignees of the estate and effects of the said *Joseph Cundy*, a bankrupt: that plaintiffs maintained the affirmative, and defendant the negative: and thereupon &c.: payment of 5*l.* by plaintiffs to defendant, and mutual promises, as usual on a feigned issue, and averment that the goods were the goods of the plaintiffs as assignees &c.: notice, and liability of defendant. Plea, that the goods were not the goods of the plaintiffs &c. Issue thereon.

On the trial, before Lord *Denman* C. J., at the sittings in *Middlesex* after *Trinity* term, 1844, a verdict was found for the plaintiffs. *Platt*, in the ensuing term, obtained a rule nisi for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. In *Trinity* vacation, 1845 (*a*),

(*a*) *June* 21st. Before Lord *Denman* C. J. and *Coleridge* J.

Watson and *Gurney* shewed cause, and *Wortley* and *Ogle* supported the rule. The facts of the case, the arguments used, and the authorities cited, will appear from the judgment of the Court, which was now delivered by

Lord DENMAN C. J. This was a feigned issue under the Interpleader act, to try the question of priority between the act of bankruptcy on which the title of the plaintiffs depended, and the defendant's execution. *Cundy* owed the defendant two sums of 700*l.* and 7300*l.* The defendant commenced proceedings to recover the 700*l.* by writ of summons served on the 30th *October*, and obtained judgment on the 23d *November*, on which day he sued out a fi. fa. under which, on the same day, the sheriff seized. The proceedings in this suit were adverse. On the same 23d *November*, after the issuing of the fi. fa., but before the seizure under it, *Cundy* signed a cognovit for the 7300*l.*; and the defendant, after the first seizure, issued a writ to levy that also, which was lodged with the sheriff, but afterwards withdrawn. The obtaining of this cognovit was relied on as an act of bankruptcy defeating the execution for the 700*l.*, as being a procurement (*a*) by *Cundy* of his goods to be taken in execution, and the jury were asked by me "whether, before the levy for the 700*l.*, *Cundy* had by the cognovit procured his goods to be taken in execution, in order to protect them" (*b*). The jury found in the affirmative: and

(*a*) Stat. 6 *G.* 4. *c.* 16. *s.* 3. "If any such trader shall" "suffer himself to be arrested for any debt not due," "or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered or taken in execution," &c., he "shall be deemed to have thereby committed an act of bankruptcy."

(*b*) The plaintiffs' counsel on shewing cause contended that in point

the defendant has obtained a rule for a new trial, on the ground of misdirection first, and secondly because the verdict is against the evidence.

Both these points, however, resolve themselves into one and the same, whether, namely, there was any evidence of procuring the goods to be taken in execution before the first seizure. The defendant contends that there can be no such procuring until the goods are actually taken; and this was not done until after the first execution, on which he relies, was complete by seizure: and the defendant then secondly contends that there is no relation back from the time when the goods were taken to the signing of the cognovit, by which the alleged procurement commenced. Upon the first point the ruling of *Alderson* B. in *Gibson* v. *King* (*a*) was cited, in which case he is reported to have said that "procuring has no effect as an act of bankruptcy till the goods are actually taken."

No other case expressly in point was cited (*b*); and this ruling appears to be correct. It would introduce a great uncertainty into the proof of this kind of act of bankruptcy, if we were to hold that any mere endeavour to bring about the party's own arrest, ineffectual in act, was sufficient evidence of it. In the criminal law it is true that mere contriving, manifested by some overt act, may in many cases amount to a misdemeanor;

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of fact the proceedings in respect of the 700*l.* were a part of the scheme of procurement to which *Cundy* was consenting: but it was insisted on the other side that the plaintiffs' case had not been so put at the trial.

(*a*) *Carr. & Marsh.* 458. 462.

(*b*) Counsel for the defendant referred to the judgment of *Parke* B. in *Hall* v. *Wallace*, 7 *M. & W.* 353. 358., from "Indeed, it may be doubted" to "converted by the subsequent sale."

but it is long since the original view of bankruptcy, according to which it was regarded as a crime, has become obsolete. In the same section, suffering oneself to be arrested is made an act of bankruptcy, as well as procuring: the former *could* not become an act unless an arrest was made; and it seems reasonable to construe the correlative in the same way. The two expressions were probably first introduced to meet the two different modes of conduct by which the same result of voluntary arrest might have been brought about; and, if "procuring" is to be so construed when applied to arrest of the person, it certainly must be, when applied to a taking of the goods in execution.

This raises the point, from what period the act dates, when completed by the seizure of the goods. No decision on this point as to this act of bankruptcy was cited; but cases said to be analogous as to other acts were relied on. Of these the first was *Hawkes* v. *Sands* (*a*), where, the order to deny being on the 26th, and the first denial on the 28th, the act of bankruptcy was said to be first committed on the 28th. But this case evidently proceeded on the notion that denial was itself an act of bankruptcy (*b*), instead of being evidence only of keeping house. And this decision may be considered to have been overruled in *Lloyd* v. *Heathcote* (*c*), and *Harvey* v. *Ramsbottom* (*d*) in this Court. These decisions, however, only shew that *Hawkes* v. *Sands* (*a*) has no bearing on this case, and do not shew that any relation here can be made. Another case, however, was cited, *Higgins* v. *M'Adam* (*e*), in which

(*a*) 3 *Doug.* 429.
(*b*) See S. C. in 1 *Co. Bank. L.* 79, where the point is so stated.
(*c*) 2 *B. & B.* 388.
(*d*) 1 *B. & C.* 55.
(*e*) 3 *Y. & J.* 1. 10.

the Court of Exchequer lay down the true principle. It is there said, "the relation back to any antecedent period to make an act of bankruptcy is a case strictissimi juris, and ought not to prevail, except where the words of the statute, upon which that construction is to be found, are clear and without doubt." Accordingly in that case the Court, after consideration, decided that, where the act of bankruptcy was by lying twenty one days in prison, upon the completion of the days there was no relation back to the first. We think this the principle applies to the present case: and the rule has the further advantage of certainty in its application. If the doctrine of relation was to be admitted, it must be to the first overt act of endeavouring; and this, in numerous cases, it might be most difficult with any certainty to fix.

We think, therefore, that there was no evidence here of the bankrupt having, before the levy for the 700*l.*, procured his goods to be taken in execution; and that that question ought not to have been left to the jury. The rule, therefore, for a new trial will be absolute.

Rule absolute.

The QUEEN *against* The Inhabitants of ST. ANNE'S, WESTMINSTER. (Re JONES).

Saturday, January 16th, and *Wednesday, January* 20th.

Reported, 8 *Q. B.* 561.

Wednesday, January 20th.

The Queen *against* The Inhabitants of St. Anne's, Westminster. (Re Wood.)

The sessions, on appeal, quashed an order of removal "not upon the merits," and "without prejudice to the making of any other order" to remove the same pauper. On appeal against a subsequent order,

Held that the appellants were not at liberty to shew, by parol evidence, that the first order of sessions was made on such grounds as, though the sessions deemed them merely technical, did legally conclude the question of settlement.

ON appeal against an order of justices, dated *November* 30th 1844, removing *George Wood*, aged one year, from the parish of *St. Pancras*, *Middlesex*, to the parish of *St. Anne* within the liberty of *Westminster*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on a special case.

The case stated that, when the appeal came on to be heard, the appellants relied on the following grounds of appeal.

1. That, on 21st *March*, 1844, the said *G. Wood* having come to inhabit in *St. Pancras*, and being then actually chargeable to that parish, a complaint was duly made &c. The ground of appeal then stated a complaint by the parish officers of *St. Pancras*, and an order then made by a metropolitan police justice for removing the pauper to *St. Anne's, Westminster*. That the parish of *St. Anne*, on receiving notice of the order, appealed, and the appeal came on for trial, and was heard, at the *Middlesex* quarter sessions on *November* 4th, 1844, when the sessions ordered that the last mentioned order of removal should be quashed, and the same was quashed accordingly: that the pauper has not gained any subsequent settlement, but the settlement then in question is the same as that on which the order now appealed against was made. Wherefore the churchwardens &c. of *St. Pancras* were estopped from alleging, upon the hearing of their complaint on

which this order was made, and are still estopped from alleging, that, at the time when this order was made, the pauper was settled in *St. Anne's, Westminster.*

2. That, if the pauper was ever settled in *St. Anne's, Westminster,* he became subsequently, and was on *March* 21st, 1844, settled in *St. Pancras,* and has not since gained any settlement in *St. A. W.* And that, on 21st *March,* 1844, an order of removal was duly made &c. The ground of appeal then stated, substantially as in the first ground, the order of removal, the appeal, the hearing and quashing of the order at the sessions on *November* 4th; and that the order of sessions then made related directly to the pauper's settlement at the date of the former removal, which is the same as that now in question, and such order is therefore conclusive between the present parties, no subsequent settlement being stated in the present order of removal or examinations.

Upon the hearing of the present appeal it was admitted by the respondents that the order of removal mentioned in the aforesaid grounds of objection was duly made and appealed against; and that the appeal thereon came on to be heard as therein also stated, and that, upon the hearing of such appeal, the sessions made the following order, viz.

"Now, the said appeal coming on to be heard: It is (after hearing counsel on both sides) ordered that the said order of the said magistrate so appealed against be quashed, not upon the merits; without prejudice to the making of any other order for the removal of the said *George Wood* from either of the said parishes to the other of them, or to any other parish or place to which he may appear to have become chargeable: and the same is hereby quashed accordingly. By the Court."

And that since the hearing of the said appeal the said pauper has not gained any settlement in the appellant parish.

The appellants, upon these facts, insisted that the said order of removal operated as an estoppel between the two parishes; and contended that the effect of such estoppel was not altered by the special clause inserted in the former order of sessions. The Court, however, held that such order did not operate as an estoppel between the parishes, but that the respondents were at liberty to prove their case in like manner as if there had been no previous order made and appealed against. The appellants then offered evidence to shew that, notwithstanding the aforesaid entry of the quarter sessions, the question decided by the Court affected the merits of the settlement; and contended that the then court of quarter sessions could enter into and decide upon the question whether the former court of quarter sessions had directed a proper entry to be made; and, if they should be of opinion that the question then decided did affect the merits of the settlement, ought to quash the order then appealed against. The Court were of opinion that they were bound by the words of the order of sessions, and that it was not competent for them to inquire into and decide upon the proceedings of the former court, and refused to hear the evidence.

If this Court should be of opinion that the decision of the quarter sessions as to the effect of the former order of sessions in this case was wrong, and that it did operate as an estoppel between the two parishes, then the order of removal and order of sessions confirming the same were to be quashed: But if the Court should be of opinion that such decision was right, and that parol evidence of the point decided on such former

occasion was inadmissible, this order of removal and order of sessions confirming the same were to stand affirmed: But if the Court should be of opinion that the decision of the quarter sessions as to the effect of the former order of sessions was right, but that evidence was admissible to shew the grounds of such entry, and that the then court of quarter sessions could decide thereon, then the case was to be remitted to the sessions to hear and decide on such evidence &c.

Godson, who was to have supported the order of sessions, was stopped by the Court.

Pashley, contrà. Although the sessions, in *November* 1844, professed to quash the order of justices "not on the merits," the present appellants were at liberty to shew that, in reality, the Court then adjudicated upon the settlement itself. In *Ex parte Overseers of Ackworth* (*a*), where the sessions had quashed an order of removal because the evidence stated in the examinations was insufficient, and had entered, on their record, discharged, "not on the merits," *Patteson* J. held that the entry was erroneous, and that the sessions had, substantially, decided the case. He said: "There is no doubt here that the decision of the sessions was touching the settlement. Where the examination actually omits some fact material to shew the settlement, it is just the same thing as if the evidence produced by the respondents on the hearing were insufficient to prove that fact, and the parties failed on that account. It appears to me that the decision of the sessions quashing an order on account of an examination being defective in

(*a*) 3 *Q. B.* 397, note (*a*).

such a respect will be conclusive as to the settlement. I do not say that it is a decision 'on the merits:' that is a term which does not convey any clear notion: I prefer saying that it is a decision on the point of settlement. The sessions, therefore, in this case, were clearly wrong." He added: "Whether it will be possible hereafter to give evidence explaining the grounds of the decision which the sessions have recorded as a decision 'not on the merits,' is a question which it is unnecessary now to enter upon." In *Regina* v. *St. Mary, Lambeth* (*a*), where the sessions left it to this Court to say whether certain former orders of sessions were conclusive against a subsequent removal, this Court held that they were, Lord *Denman* C. J. saying: "We can see that they had already decided the case, not expressly on the merits, but in such a manner as to dispose of the interests of the parties." The same might have been shewn here, if the appellants had been suffered to proceed. The words "not upon the merits," and "without prejudice to the making of any other order," did not occur in that case; but these are loose and colloquial phrases, and cannot alter the effect of a decision on the settlement, if the order really involved one. An estoppel precludes a party from litigating the same point which was decided against him before: if the questions are not identical, there is no estoppel; *Outram* v. *Morewood* (*b*), *Booth on Real Actions*, 113., B. 2. *c.* 3. 2d ed., *Hudson* v. *Lee* (*c*), *Doctrina Placitandi*, 65, et seq., tit. *Barre*, 6, *Regina* v. *Walker* (*d*). A record is conclusive; "but to take aver-

(*a*) 7 *Q. B.* 587.

(*b*) 3 *East*, 346. See *Rex* v. *Wick St. Lawrence*, 5 *B. & Ad.* 526. 536., judgment of *Parke* J.

(*c*) 4 *Rep.* 43 *a.*

(*d*) 2 *M. & Rob.* 446.

ment which stands with the record, and which doth not impugn anything apparent within the record, the law doth well admit and allow;" *Hynde's Case* (*a*). [*Patteson* J. The point here is merely whether the sessions, in the former order, have stated what is conclusive. The general course of authorities on estoppel is beside the question. *Coleridge* J. The question we are upon is the meaning of the particular entry.] The sessions may have given their judgment on a ground which was conclusive of the settlement, though they may have deemed it unconnected with the merits; as upon the want of a stamp, or of some necessary detail of evidence in the examinations. It was not material to the order of sessions to state whether the order of removal was quashed on the merits or not; and an averment not material cannot estop; *Bro. Abr. Estoppell*, pl. 178. If the sessions had expressly said that they quashed without meaning to decide upon the settlement, or that they quashed for want of proof of chargeability, the case would have been different. It has always been a rule that, if an order of sessions does not state the ground on which an order of removal is quashed, the ground may afterwards be shewn by parol evidence. This was laid down by all the Court in *Rex* v. *Wick St. Lawrence* (*b*). The judgment of a prize court is not conclusive as to the ground of judgment unless the ground be expressly stated; *Fisher* v. *Ogle* (*c*), *Dalgleish* v. *Hodgson* (*d*). An estoppel must be certain, and not raised by inference or intendment; 1 *Roll. Abr.* 874, tit. *Estoppell* (R) pl. 3, 4.; *Hales* v. *Risley* (*e*), *Rex* v. *Lyme Regis* (*g*).

(*a*) 4 *Rep.* 70 *b*, 71 *b*.
(*b*) 5 *B. & Ad.* 526.
(*c*) 1 *Camp.* 418.
(*d*) 7 *Bing.* 495.
(*e*) *Pollexf.* 369. 396.
(*g*) 1 *Doug.* 149. 159.

Lord DENMAN C. J. The attempt in this case is, practically, to enforce an estoppel. The sessions had quashed a former order, but with an entry that they quashed, not upon the merits, and without prejudice to the making of any other order for removing the pauper. The argument now is, that that special entry is to be excluded from the judgment, and the quashing of the order taken as final. We perfectly understand what is meant by such an entry: and probably the sessions, in making it, were rather influenced by our suggestions in *Rex* v. *Wick St. Lawrence* (*a*). There is no reason to doubt that they understood what their entry meant. The truth, by some accident, was not tried: the quashing was analogous to a nonsuit, and was intended not to bar the respondents from removing again. The ground may have been the accidental absence of a witness, or some other such cause as has been suggested: if that was so, the sessions may have been wrong in making the entry: but it is otherwise if the order was quashed (as it may have been) on grounds not decisive of the question of settlement. I think, therefore, that the present order of sessions is right. *Ex parte Overseers of Ackworth* (*b*) is consistent with this decision; for, the sessions there having made their orders expressly, "not on the merits," the learned Judge would not interfere with an entry which, whatever his opinion of it might be, they were competent to make.

PATTESON J. If we held now that the sessions might have received evidence of the ground on which the former Court of Quarter Sessions discharged the

(*a*) 5 *B. & Ad.* 526. (*b*) 3 *Q. B.* 397, note (*a*).

order of *March* 1844, we should have misled them by our judgment in *Rex* v. *Wick St. Lawrence* (*a*). The remarks there made were intended to prevent the very difficulty now raised, and will have worked a deception if we are to say now that the words "not on the merits" mean nothing. The attack I unfortunately made on that expression in *Ex parte Overseers of Ackworth* (*b*) shews that we ought to be careful in making comments of this kind. If I thought the phrase unsatisfactory, it may have been because I was more accustomed to the language of pleading than to that of proceedings at sessions.

COLERIDGE J. It is admitted that the same question arose in this case which the former Court of Quarter Sessions had considered not to be decided on the merits. The point here really is, what the words "not on the merits" mean. They may certainly have been used, in a popular sense, as signifying that the sessions decided the appeal on some ground which appeared to them merely technical, though in law it was final. If so, the expression was a wrong one; but we are not to presume that it was used in that sense; and the words "without prejudice to the making of any other order" tend to shew the contrary.

WIGHTMAN J. I am of the same opinion: and Mr. *Pashley*'s own argument goes a great way in proving to me that the respondents ought not to have been held estopped from entering into their case.

Order of sessions confirmed (*c*).

(*a*) 5 *B. & Ad.* 526. (*b*) 3 *Q. B.* 397, note (*a*).

(*c*) See the next four cases.

Wednesday, January 20th.

The QUEEN *against* The Inhabitants of ST. PETER'S, DROITWICH.

An order of justices under stat. 9 *G.* 4. *c.* 40., adjudicating on the settlement of a pauper lunatic, and directing the officers of parish *A.* to pay for his maintenance in a house for reception of lunatics, was quashed on appeal, subject to a case. The case submitted, as questions for this Court, whether a former order of sessions, quashing a former order of justices touching the settlement and maintenance of the same lunatic pauper, on appeal by parish *A.* was or was not conclusive; and whether the present order of justices was valid or not, inasmuch as it directed payment, not to the county treasurer, but to other parties. This Court, on argument of the special case, gave judgment against the present order of justices; and it was quashed. A third order, adjudging the settlement to be in *A.*, and directing payment by *A.* for the maintenance of the same pauper, was appealed against and quashed, subject to a case. The case stated the former judgment of this Court, and the reasons given by the Court, from which it appeared that the then order of justices was quashed on the last point only.

Held that the quashing of the last mentioned order by judgment of this Court might be explained by evidence of the reasons; and that the opinion delivered by the Court, as stated in the present case, was evidence that such order was not quashed on the ground that the settlement was not proved; for which reason, the quashing was not conclusive.

Semble, per Lord *Denman* C. J., *Coleridge* and *Wightman* Js., that, under stat. 9 *G.* 4. *c.* 40., the quashing of an order of justices as to settlement and maintenance of a lunatic pauper, though not on formal grounds, is not necessarily conclusive, but that, by sect. 42., a subsequent order, made on new inquiry, may be valid.

ON appeal by the churchwardens and overseers of the parish of *St. Andrew, Worcester*, against an order of three justices, dated *January* 23d, 1845, adjudicating on the settlement, and ordering payment for the future maintenance, &c., of *John Hughes*, a lunatic pauper, the sessions quashed the order, subject to the opinion of this Court on a case, the material parts of which were as follows.

The pauper having become chargeable to the parish of *St. Peter, Droitwich*, and it having been legally proved to the satisfaction of two justices for the borough that he was insane, he was, by their order, dated 13th *April* 1841, removed to the house of Messrs. *Ricketts* and *Steward* in the borough of *Droitwich*, in the county of *Worcester*, duly licensed for the reception of insane persons, and there being no county asylum or public hospital &c. At that time the pauper's place of settlement could not be ascertained; but the said two justices, on 29th *April* 1841, made another order, by which,

after reciting their previous order, and that the settlement of the pauper could not at the date of that order be ascertained, and that they had proceeded to enquire &c., they adjudged the settlement to be in the parish of *St. Andrew*, in the city of *Worcester*, and ordered the overseers of *St. Andrew's* to pay a certain sum for the expenses of the pauper's removal to the asylum, and to pay weekly to *Ricketts* and *Steward* such sum for the maintenance of the pauper as they should be willing to accept, and as should appear to the justices making the said order to be reasonable. Against this order the officers of *St. Andrew's* gave notice of appeal, with grounds of appeal. The respondents, on 24th *June* 1841, sent to the appellants a notice of abandonment of their said order. The appellants entered their appeal; and, at the sessions held *June* 28th, 1841, the order of 29th *April* 1841 was quashed by consent generally, with 40*s.* costs.

The pauper remained in the said licensed house under the order of 13th *April* 1841, at the expense of the parish of *St. Peter*, until 24th *September* 1841, when the Rev. *John Topham* and *Richard Frances*, Esq., two other justices in and for the said borough of *Droitwich*, proceeded to hear evidence as to the settlement of *Hughes*, and made an order by which they adjudged his settlement to be in the parish of *St. Andrew*, and ordered the churchwardens &c. of *St. Andrew's* to repay *unto William Wylde, one of the overseers of the parish of St. Peter*, 14*l.* 2*s.* for the removal of the pauper and for his maintenance &c. in the house of *Ricketts* and *Steward* from 13th *April* 1841 to the date of their order. By the same order they further directed the churchwardens &c. of *St. Andrew's* to pay to *Ricketts*

and *Steward*, from the date of the order, the weekly sum of 12*s.* for the future maintenance &c. of the pauper. The parish of *St. Andrew* appealed, and gave a notice pursuant to stat. 9 *G.* 4. *c.* 40., together with the grounds of such appeal, which raised the objection afterwards relied on.

On the hearing of the appeal at the *Worcestershire* sessions, *October* 1841, it was admitted that the adjudication in the order of 24th *September* 1841 was upon the same settlement as the order of 29th *April* 1841. The appellants then contended that the order of *June* 28th, 1841, quashing the order of justices of 29th *April* 1841, generally, was conclusive as between the appellants and respondents as regarded the settlement and maintenance of the pauper, and that parol evidence was inadmissible to shew that the order was not quashed on the merits. The sessions, however, received parol evidence as to the grounds: and, as it appeared to them that the order was abandoned and quashed for defects in point of form, and not on the merits, they proceeded to hear the appeal. The appellants next objected that the respondents ought to have sent them notice of the removal of the pauper, and a copy of the examination on which such removal and the adjudication of settlement and order of maintenance was obtained, according to the provisions of stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79 (*a*). The sessions overruled this objection. The appellants contended, thirdly, that the order of 24th *September*, 1841, was bad on the face of it, inasmuch as it directed the repayment of 14*l.* 2*s.* by the churchwardens &c. of *St. Andrew's* to *W. Wylde*, one of the overseers of *St. Peter's*, instead of directing it to be repaid to the treasurer of

(*a*) See *Regina* v. *Justices of West Riding*, 10 *Q. B.* 763.

the county of *Worcester*, according to stat. 9 *G.* 4. *c.* 40. This objection the sessions also overruled: and, after hearing evidence, they confirmed the order of 24th *September* 1841, subject to the opinion of the Court of Queen's Bench upon a case. The case comprised the facts above mentioned, and concluded thus. 1. If the Court shall be of opinion that the sessions were bound, under the circumstances, to treat the judgment of the sessions of *June* 28th, 1841, by which the order of justices of 29th *April* 1841 was quashed, as conclusive between the parties, then the order of sessions of *October* 1841 is to be quashed. 2. If the Court shall think the respondents were bound to send a copy of the examination, and notice of removal, to the appellants, then the order of sessions is to be quashed. 3. If the Court shall think the order of 24th *September* 1841 bad on the face of it, as directing the sum of 14*l.* 2*s.* to be repaid to *W. Wylde* instead of to the treasurer of the county, then the order of sessions is to be dealt with as the Court of Queen's Bench shall think fit.

The case so stated was argued in *Michaelmas* term, 1842 (*a*), when the respondents contended that, if the Court should think the order of 24th *September*, 1841, bad for the reason assigned in the 3d objection only, the Court might quash the order so far as it related to the repayment of 14*l.* 2*s.*, and confirm it as to the residue. In *Easter* vacation, 1843, the judgment of this Court upon the case was delivered by Mr. Justice *Williams*, who, after recapitulating the facts, proceeded to state: "We do not consider it to be needful to enter into the different objections taken on behalf of the appellants,

(*a*) *Regina* v. *St. Andrew's, Worcester*, 4 *Q. B.* 729

because there is one which seems to us clearly fatal to the order. In the case just disposed of (*a*), we had occasion to refer to the different sections of the act regulating the manner of making reimbursement in these cases, and the person to whom it is to be made: and in none of these is there any provision enabling the justices to direct the sum to be reimbursed to be paid to the overseer of the parish or place to which the pauper lunatic may have been chargeable. Inasmuch, therefore, as the jurisdiction depends entirely upon the statute, and it is not given to them in the form adopted, we think that the order of sessions cannot be sustained, and that it must accordingly be quashed (*b*)."

During these proceedings, and up to and on 23d *January* 1845, the pauper remained insane, and confined in the said licensed house, under the order of 13th *April* 1841, at the cost of the parish of *St. Peter*. On 23d *January*, 1845, three justices of the peace (named in the present case), acting in and for the borough of *Droitwich*, made an order, by which, after reciting the order of 13th *April* 1841, and that the pauper had been conveyed under it to the said licensed house, and, from 13th *April* 1841 until 23d *January* 1845, had been, and then was, an insane person confined under the said order at the cost of the said parish of *St. Peter*, and reciting also that the legal settlement of the pauper had not been ascertained, the said justices adjudged the place of the last legal settlement of the pauper lunatic to be in *St. Andrew's Worcester*, and ordered the churchwardens and overseers of *St. Andrew's* to pay to the keepers of the said house, from

(*a*) *Regina* v. *Pixley*, 4 *Q. B.* 711.

(*b*) See 4 *Q. B.* 728. The above extract is in the language of the case, which slightly differs from that of the original judgment.

the date of that order, 9*s.* weekly, for the future maintenance of the pauper during his continuance in the said house. Against this order the churchwardens &c. of *St. Andrew's* duly appealed.

On the trial of the appeal, on 7th *April* 1845, the appellants contended, under a ground of appeal which duly raised the objection, that the judgment of the Queen's Bench, quashing the former order, was, under the circumstances above stated, conclusive between the parties. The respondents contended that, as the judgment was grounded upon the informality of that part of the order of *September*, 1841, which directed the repayment of 14*l.* 2*s.* to the overseers of the respondent parish, such judgment was not conclusive between the parties as to the settlement. The sessions, however, after argument, decided that they were bound by the judgment of the Queen's Bench as conclusive between the parties as to the settlement, and quashed the last order accordingly, subject to the opinion of this Court.

If the Court should be of opinion that the judgment of the Queen's Bench was conclusive as to the settlement, so as to prevent the parish of *St. Peter* from obtaining a fresh order as against the parish of *St. Andrew*, and giving evidence in support of it, the order of sessions was to be confirmed: if the Court should be of a contrary opinion, that order was to be quashed, and the order of justices of 23d *January*, 1845, to be confirmed.

Martin and *Beadon*, in support of the order of sessions. The order of 24th *September* 1841 appears to have been quashed by this Court generally; and there is nothing stated in the case from which the sessions, on the last appeal, could infer that it was quashed otherwise than on

the merits. That, if true, might have been shewn, according to *Rex* v. *Wick St. Lawrence* (*a*), but is not: and therefore the former quashing must be deemed conclusive. The authorities bearing on this point were considered in *Regina* v. *Church Knowle* (*b*). It may be contended that the judgment of the Court of Queen's Bench discloses a ground of quashing, independent of the merits. But the sessions were bound to adopt the judgment, not to look into the reasons. They had requested this Court, if they thought the order bad as directing payment to the wrong person, to deal with it as they should think fit. The Court did so, by quashing the order; and that was a complete answer to the proposition submitted. The respondents must abide by the result of the case. [Lord *Denman* C. J. So they do. But our judgment, when given, becomes that of the sessions.] The first point submitted clearly raised a question of merits. [*Coleridge* J. That could only shew that there were materials on which we might have decided on the merits, but did not. And, if the sessions are to be considered as adopting our judgment, they also do not.] The question is, whether the Court, when it might have quashed in part for the reason specially given, has not quashed in toto.

Bodkin, *Whitmore* and *Selfe*, contrà, were stopped by the Court.

Lord DENMAN C. J. I think it quite clear that the quashing of the order of 24th *September* is not conclusive. We ordered it to be discharged on the particular

(*a*) 5 *B. & Ad.* 526. (*b*) 7 *A. & E.* 471.

ground stated in our judgment, and which did not affect the merits. And it is to be observed that an order of justices on the settlement and maintenance of a lunatic differs from a common order of removal, because, under stat. 9 *G.* 4. *c.* 40. *s.* 42., the justices may, "at any time," "enquire into the last legal settlement of such insane person." The question of estoppel hardly arises.

PATTESON J. It is true that, in the former case before us, one point was, whether the quashing of a previous order was or was not conclusive. But on that the Court gave no opinion; and, specifically, our judgment was given on one ground, excluding the others.

COLERIDGE J. I am of the same opinion, on the facts here stated. But, if they were different, I should not propose to lay down a rule of practice applying generally to the removals of lunatic paupers. It seems to me that magistrates may have a power of enquiring from time to time in such cases; and so the rule as to these orders may be different from that which prevails in the common case of removal.

WIGHTMAN J. I am of the same opinion: but I give mine with the qualification stated by my brother *Coleridge*.

Order of Sessions quashed (*a*).

(*a*) See the preceding and the next three cases.

Wednesday, January 20th.

The Queen *against* The Inhabitants of Widecombe in the Moor.

On appeal against an order of removal, the appellants offered evidence of a former judgment of quarter sessions quashing an order of removal founded on the same alleged settlement. The order of sessions, as entered on their minutes, stated that the order of removal was quashed "on the ground *that the examinations are insufficient to support the same.*" Held that this entry was general enough to let in evidence on the part of the respondents that the adjudication proceeded on matter of form, not merits.

To make the examination of a person in custody admissible under stat. 59 *G.* 3. *c.* 12. *s.* 28., on a question of settlement, it must be proved expressly that the party was in custody, as required by the statute, at the very time when such examination was tendered in evidence.

The wife and children of *R. B.*, were removed on examinations shewing settlement of *R. B.* by hiring and service under *C.*, and by birth. The appellants stated as distinct grounds of appeal: That the parents of *R. B.* were removed to, and acknowledged as settled inhabitants by, a third parish, and that he had acquired no settlement in his own right: That *R. B.* did not become settled in the appellant parish by hiring and service under *C.*: And: That the paupers were *not settled in the appellant parish in any manner whatever.* Held that the appellants could not give evidence that *R. B.* was not born in the appellant parish.

ON appeal against an order of justices, dated 14th *February* 1845, removing *Mary*, wife of *Richard Barnett*, then a prisoner under sentence of transportation and in custody for the same, and her five children, from the parish of *Plympton St. Mary* to the parish of *Widecombe in the Moor*, both in *Devonshire*, the sessions (*Midsummer*, 1845,) confirmed the order, subject to the opinion of this Court on the following case.

At the trial of the appeal the respondents set up a settlement gained by *Richard Barnett*, the husband of the pauper *Mary*, by hiring and service in the parish of *Widecombe;* in support of which they tendered in evidence the following examination, taken under stat. 59 *G.* 3. *c.* 12. *s.* 28. (*a*); it having been first proved

(*a*) Stat. 59 *G.* 3. *c.* 12., "to amend the laws for the relief of the poor," enacts (sect. 28): "That it shall be lawful for any justice of the peace to take in writing the examination on oath of any person having a wife or child, who shall be a prisoner in any gaol or house of correction, or in the custody of the keeper of any such gaol or house of correction, or who shall be in the custody of any constable or other peace officer, by

that the said *R. Barnett* was, prior to the taking of the said examination, convicted of felony, and was, at the time of the taking thereof, under sentence of transportation for the same, although what had since become of him, save that he was no longer in the *Devon* county gaol, did not appear.

"*Devon*, to wit. } The examination of *Richard Barnett*, miner, lately inhabiting in the parish of *Plympton St. Mary* in the said county of *Devon*, but now a prisoner in the *Devon* county gaol at *Exeter*, taken on oath before me" &c., "one of her Majesty's justices" &c., "on this 1st day of *January* 1845, touching the place of the last legal settlement," &c. "Who saith: When I was young I lived at home with my parents in the parish of *Widecombe in the Moor*, and *Lidford*, both in the county of *Devon* aforesaid, until I was between 13 and 14 years of age, and then, in or about the year 1821, I went to live as a servant" &c. The examination then stated a hiring and service, and residence for two or three years by the pauper (being unmarried &c.), with one *Thomas Chaffe*, in *Widecombe*, after which the pauper joined his father, who then lived at *Lidford*, and worked with him at *Ealesborough* mine as a day labourer for three or four years. The pauper also said: "I never rented to the amount of 10*l.* a year, nor did any other act, except as aforesaid, whereby to gain a settlement:" "I was married in the parish church of *Buckfastleigh*, in the said county of *Devon*, to *Mary* my first and present wife."

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virtue of any warrant of commitment, touching the place of his or her last legal settlement; and such examination shall be signed by such justice taking the same, and shall be received and admitted in evidence as to such settlement before any justices, for the purpose of any order of removal, so long only as the person so examined shall continue a prisoner."

"I have had by my said wife seven children, all born in lawful wedlock: six of them are now living; and five of the said children were, prior to my apprehension, with me and my wife in the parish of *Plympton St. Mary* aforesaid, and under our charge, and now continue there under her charge, viz. *Susanna Barnett*, aged 16 years, not emancipated; *Hester*, aged" &c. (similar statements as to the other four): "I resided in the parish of *Plympton St. Mary* almost ever since our said marriage until the month of *September* last, when I was committed to the *Devon* county gaol, and where I have been ever since, and still remain in custody there."

The appellants, submitting that the present case could not come within the statute of 59 *G. 3. c.* 12. *s.* 28., and that at all events further proof was necessary on the part of the respondents to make it so, contended that the said examination was not admissible as evidence on the hearing of this appeal. The sessions held that it was admissible, but granted a case on that point.

The settlement in *Widecombe* having been put in evidence in support of the order of removal, the appellants then proved that a former order, dated 17th *September* 1844, for the removal of the same paupers on the same settlement, was quashed by the sessions in *January* 1845; the order made by the Court at the time, as entered in the minute book of the clerk of the peace, and put in evidence at this trial, being as follows.

"This Court, on the motion of the respondents, and with the consent of the appellants, doth quash the said order, on the ground that the examinations upon which the said order of removal was made are insufficient to

support the same: and the said order of removal is hereby quashed accordingly."

Upon this the appellants contended that the former order, having been thus quashed, was in fact quashed on the merits, and that the present order, consequently, could not be supported.

In answer to this the respondents tendered parol evidence to explain the entry in the minute book, and to shew that it did not contain the true judgment of the sessions, the chairman, in giving judgment, having used the additional words "and not on the merits." The appellants objected to the admissibility of evidence for this purpose: the sessions, however, having received it, held, upon the additional evidence, that the former order was not conclusive, it having been quashed for insufficiency of examinations and not on the merits, if the Court were at liberty to receive any evidence to explain the minutes of the Court: but granted a case on this point also.

A birth settlement in *Widecombe* having been also set up by the respondents in the examinations, the appellants then, relying on their grounds of appeal which follow, proposed to prove that *R. Barnett* was not born in *Widecombe*, but in the parish of *Lidford*, in *Devon*."

Grounds of appeal. 2. This ground of appeal stated the quashing of the before mentioned order of *September* 17th, 1844, and averred that the order of sessions quashing that order of removal related directly to the settlement of *Mary Barnett* and her said five children, being the same settlement now in question, and was conclusive between the parties to the present appeal, no later settlement being shewn by the examination.

3. Removal, under an order of two justices in 1822,

of *William* and *Susanna*, the parents of *Richard Barnett*, from the parish of *Lidford* to the parish of *Wendron* in *Cornwall*; which order was unappealed against, and thereby *William* the father became settled in *Wendron*; and consequently *Richard* and his family became and were, at the date of the order now appealed against, legally settled in *Wendron*, the said *Richard* having acquired no settlement in his own right.

4. Removal of *Susanna* the mother of *Richard*, in 1830, by order of two justices, from the parish of *Sheepstor*, in *Devon*, to the said parish of *Wendron*; which order was unappealed against; and thereby *Susanna* became settled &c. (conclusion as in the preceding ground of appeal).

5. Acknowledgments of *Susanna* as a settled inhabitant by the parish officers of *Wendron*, between 1830 and the present time; whereby &c. (Conclusion as in the two preceding grounds) (*a*).

7. Because the said *Mary Barnett*, the wife of the said *R. Barnett*, and *Susanna* &c., their children, "were not, nor was any or either of them, at the time of making the said order of removal against which we appeal, settled in our said parish of *Widecombe in the Moor* in any manner whatever."

The sessions held that the appellants were not entitled, under these grounds of appeal, to go into this question, but granted a case on this point also, finding as a fact, if such evidence were admissible, that *Richard Barnett* was not born in *Widecombe*.

The questions for the consideration of this Court

(*a*) The following ground of appeal was not stated in the case, but was referred to in argument.

6. That *Richard Barnett* did not acquire a settlement in *Widecombe* by hiring and service with *Thomas Chaffe*, and by inhabitancy in the said parish, in manner and form as set forth in the examination.

were: "1. Was parol evidence legally admissible to explain the entry in the minute book? If it was not, then the present order of Sessions is to be quashed. 2. If it was admissible, then was the examination of *R. Barnett* admissible? If that examination was admissible, the order of Sessions is to be confirmed. If that examination was not admissible, then was the evidence tendered by the appellants to disprove the birth settlement in *Widecombe* admissible? If it was, then the order of Sessions is to be quashed."

Merivale and *Cornish*, in support of the order of Sessions. On the first point, *Rex* v. *Wick St. Lawrence* (*a*) clearly shews that, if the judgment of the sessions in *September*, 1844, quashing the order of removal then in question, may be deemed general, evidence was admissible to explain it by shewing that the adjudication was not on the merits. But the order is not less open to explanation because the sessions, in quashing the order, have added, as the ground, "that the examinations" "are insufficient to support the same." They may have been so by reason of an informality; such as a defect in the captions. [*Patteson* J. That would hardly be described as insufficiency in the examinations. The expression seems rather to imply that they did not contain sufficient evidence.] *Regina* v. *St. Mary, Lambeth* (*b*), may be cited on the other side; but there the former orders of sessions expressly purported to quash "on the ground of the examination" "disclosing no settlement on the face thereof." And in *Regina* v. *Ellel* (*c*), which may likewise be referred

(*a*) 5 *B. & Ad.* 526. (*b*) 7 *Q. B.* 587.
(*c*) 7 *Q. B.* 593.

to, the case set forth the circumstances under which the former order was "set aside for insufficiency of examination;" and the opinion of this Court was, in effect, asked, whether the insufficiency was such that the quashing of the order was conclusive. Secondly: the examination of *Richard Barnett* was admissible under stat. 59 *G.* 3. *c.* 12. *s.* 28. It was taken on 1st *January* 1845, *Barnett* being then convicted of felony and under sentence of transportation; and it must have been used before the removing justices on *February* 14th, 1845. The Court will not presume that the conviction did not continue in force when the examination was tendered in evidence at the sessions. It must be supposed that he had left the gaol in custody to undergo his sentence. [Lord *Denman* C. J. You do not shew when the conviction took place. *Coleridge* J. The gaoler could have said under what circumstances *Barnett* was removed from the *Devon* county gaol.] Thirdly, the appellants were not at liberty to disprove the birth settlement, not having expressly questioned it in any part of their grounds of appeal. *Regina* v. *Hockworthy* (*a*) and *Regina* v. *Staple Fitzpaine* (*b*) shew the necessity of precision in this respect.

Rowe, contrà. First, the minute book of the Sessions is considered as the record of their order; *Regina* v. *Yeoveley* (*c*): and evidence cannot be received to vary the statement contained in it. The entry is not general it is definite: and the effect of the evidence was, not to explain, but to vary it by words supposed to have fallen from the chairman. [*Wightman* J. The question stated

(*a*) 7 *A.* & *E.* 492. 496.
(*b*) 2 Q. *B.* 488. 497, 498.
(*c*) 8 *A.* & *E.* 806.

by the case is, whether evidence was admissible "to explain" the entry.] The context shews that more than explanation was sought. [Lord *Denman* C. J. We must look to what is submitted to us.] The minute is equivalent to the entry of a verdict on the postea; and that is conclusive of the fact that such a verdict was found: evidence cannot be offered to shew that it was entered on the postea by mistake; *Reed* v. *Jackson* (*a*).] [*Wightman* J. The entry standing as it does, might not evidence be given to explain it? *Coleridge* J. Suppose the chairman gave a reason for the judgment; might not that be stated in evidence, as the observations delivered by *Williams* J. were in a case (*b*) decided by us to-day?] The record itself ought to be the evidence of the adjudication; otherwise a wide door is opened to dispute. Secondly, as to the examination of *Richard Barnett*. [Lord *Denman* C. J. We are with you on that point.] Thirdly, the appellants were entitled to contradict the case of the respondents as to the birth settlement. The 6th ground of appeal denies that *Richard Barnett* acquired a settlement in *Widecombe* by hiring and service and by inhabitancy; and then the 7th ground states that the paupers were not settled there "in any manner whatever." These, the only material grounds, do not in terms refer to a birth settlement; but neither do the examinations point to any supposed settlement except by hiring and service and by birth: the 6th ground negatives the one, and the 7th must be taken to deny the other. [*Coleridge* J. One ground of appeal cannot be construed with reference to another. Grounds quite inconsistent are some-

(*a*) 1 *East*, 355.

(*b*) *Regina* v. *St. Peter's, Droitwich*, antè, p. 886.

times joined.] It has never been held that they are independent, as pleas are. [*Coleridge* J. You sometimes see two entirely different settlements in different grounds of appeal.] In *Regina* v. *Bedingham* (*a*), where the examinations shewed a hiring and service to *J. S.* in the appellant parish, and relief by that parish while the pauper lived elsewhere, the ground of appeal was that the hiring was dissolved within a year, and that the pauper never acquired a settlement in the parish either by hiring and service with *J. S.* "or by any other means:" and, though the relief was not there expressly questioned, the appellant was deemed at liberty to shew that it was given by mistake. [*Coleridge* J. The argument was that relief was not a mode of becoming settled, but merely evidence of settlement; and, the settlement by hiring and service being denied, it was held that the appellant might explain the evidence applicable to it.] The respondents here could not be misled.

Lord DENMAN C. J. The sessions were right in receiving evidence of the circumstances which led to the former order. The finding of the sessions binds, but only to the same extent as a general finding would: and it lets in the explanation that, upon any reasonable ground which may be shewn, the quashing might be said not to take place on the merits. This is not inconsistent with what we have held in former cases. I am not now deciding on the effect which should be given to anything stated as having fallen from the chairman; I only say that evidence, generally, was admissible as

(*a*) 5 *Q. B.* 653.

to the reasons of the judgment. On the second point we have already intimated our opinion. The examination of *Barnett* could be made admissible at the sessions only by shewing that he was a prisoner when it was tendered. Thirdly, the appellants were not authorized by their grounds of appeal to question the birth settlement. "Not settled" "in any manner whatever" was not a form of words under which evidence could be given in disproof of the particular settlement.

Patteson J. As to the first point: the sessions, in 1845, were not content with quashing the order, but assigned a reason, which appears to mean that the examinations are insufficient to support a settlement: but the only view on which the subsequent sessions could be justified in receiving evidence of the intention is to consider the quashing as general. However, as the order of the sessions in 1845 may be deemed consistent with more than one view, I suppose it was right that the sessions should receive some evidence. On the second point, I agree in what has been laid down. As to the last point, the 3rd, 4th and 5th grounds of appeal set up a case which seems to admit that the pauper was born in the appellant parish; or, at any rate, makes the place of birth immaterial: then the 6th and 7th grounds are relied upon; but I think that, if the appellants meant to insist upon a birth in some other parish than their own, that should have been distinctly stated.

Coleridge J. If my brother *Patteson* had not expressed a doubt on the first point, I should have thought it very clear. His opinion seems to be that the terms of the former adjudication were not general: but I think

they are so in effect, when the finding is such as may import that the settlement is res judicata, or may leave the question open: and that was so here, the Sessions having decided only on something which might be formal or substantial, permanent or removeable to-morrow: as defect in proof of chargeability. In this sense I think that the finding in 1845 was general, and evidence receivable to explain it. As to the last point, it is not in the spirit of our former decisions to hold that the evidence as to birth settlement was admissible. Many grounds of appeal were stated. The appellants rely upon a kind of process of exhaustion as shewing that the course of proof attempted by them was sufficiently indicated beforehand. But that process did not come into operation till the parties were at the sessions. The question is, whether the grounds of appeal give fair and just information when they are delivered. *Regina* v. *Bedingham* (*a*) was rightly decided, but does not affect this case. The evidence objected to there was meant to explain the evidence of relief from which the respondents inferred a settlement of some kind: not to disprove any specific settlement, either by hiring and service or by "other means." As my brother *Wightman* pointed out, it would have answered no purpose to traverse the fact of relief, the relief not being a substantive settlement, but only evidence of one. That proof being introduced as confirmatory of a settlement by hiring and service or otherwise, it would have been unjust to exclude evidence which furnished an answer to it.

WIGHTMAN J. The distinction taken between this case and those in which it has been held that an order

(*a*) 5 Q. B. 653.

of sessions might be explained would be maintainable if it were a necessary consequence of the finding here that the settlement was decided. But, that not appearing, the respondents were at liberty to shew that the insufficiency mentioned in the order related to form only, and not to merits. It is suggested that the evidence given did not shew that the sessions determined the appeal on matter of form, but only that the chairman added to their decision the words "not on the merits." If the statement on the case had been such as to raise this point, I should have doubted the propriety of the present finding, under the circumstances as they appear. But the only question before us is whether any evidence at all was admissible to shew that the former finding of the Sessions was on form and not on merits. On the other points I agree with the rest of the Court.

Order of Sessions confirmed (*a*).

(*a*) See the two preceding and the next two cases. And, as to the last point in this case, *Regina* v. *St. Giles, Colchester, Trinity* vacation, 1848, post.

The following case was decided in *Easter* term, 1847.

The QUEEN *against* The Inhabitants of LANDKEY.

[*Wednesday April* 28th]

Where appellants against an order of removal have delivered grounds of appeal containing objections of form, and respondents, having given notice of abandonment, apply to have their own order quashed, such quashing is not conclusive, though there be, in the grounds of appeal, other objections going to the merits, and though the notice does not specify the grounds of abandonment.

Therefore, where, under such circumstances, the sessions had quashed the order, with an entry, "Order quashed, without any special entry, as the Court have no evidence before them to enable them to make such entry:" Held, that a subsequent Court of Quarter Sessions, on appeal against a new order bringing the same settlement into question, might properly decide that the quashing was not conclusive.

ON appeal against an order of justices for the removal of *Elizabeth Wedlake*, widow, and her seven children, from the parish of *Roborough* to the parish

of *Landkey*, both in the county of *Devon*, the sessions confirmed the order, subject to the opinion of this Court on a special case.

The case set out a former order of justices, dated 16th *November* 1844, for the removal of the paupers from *Roborough* to *Landkey;* also the examinations upon which that order was made, setting up a derivative settlement of the pauper *Elizabeth*'s deceased husband in *Landkey*. It then set out the grounds of appeal against that order, dated 16th *March* 1845; which raised objections to the proof of chargeability, and others, of a formal nature, to the statements in the examinations; they also specified objections on the merits, and, among others, a denial of the settlement. The case then stated that, on 6th *April* 1845, the parish officers of *Roborough* gave notice to those of *Landkey* that they intended to abandon the said order, and "to appear at the next quarter sessions of the peace for the said county only for the purpose of quashing the said order, and obtaining a special entry that such order was quashed not upon the merits," with an undertaking to pay reasonable costs. That, at the ensuing sessions (*April* 1845), the counsel for *Roborough* moved the Court to quash the order with an entry "not on the merits:" and this was resisted by counsel for the parish of *Landkey*. "The examinations and grounds of appeal were before the Court; but no enquiry took place as to the question of settlement. The Court refused to make the entry; and the entry made in the sessions book was as follows: 'Order quashed, without any special entry, as the Court have no evidence before them to enable them to make such entry.'"

The case stated that the second order was made on

8th *September* 1845; against which *Landkey* gave notice of appeal. The ninth ground of appeal was relied on, and was to this effect: "that a former order" (describing it) "was appealed against by the said parish of *Landkey*, and that the said order upon the said appeal was quashed by the court of quarter sessions" &c.; "which order so quashed is binding and conclusive as between the said parish of *Landkey* and the said parish of *Roborough*." That the appellants proved the quashing of the former order; and the respondents then offered evidence (*a*) to explain the grounds of quashing such order, and to shew that it had not in fact been quashed on the merits: and the Court, after hearing such evidence, held that the former order was not, in their judgment, quashed on the merits, and confirmed the order of 6th *September* 1845, subject to a case on the following point:

Whether, under the circumstances above set out, the quashing of the former order was conclusive between the parishes. If the Court should be of opinion that the quashing was conclusive, the order of sessions and order of removal were to be confirmed.

Rowe and *Cornish*, in support of the order of Sessions, relied on *Regina* v. *Widecombe in the Moor* (*b*).

Merivale and *J. Karslake*, contrà. Undoubtedly parol evidence is receivable to explain the ground of a former general quashing; and the entry in *Regina* v. *Widecombe in the Moor* (*b*), "doth quash" "on the ground

(*a*) It was admitted that the only evidence so offered and received was evidence of the facts above set out.

(*b*) Antè, p. 894.

that the examinations" are "insufficient to support" the order, was in fact a general quashing, the words not pointing of necessity either to a quashing on the merits, or to one not on the merits. But in the present case it is attempted to carry that decision a step farther, and, in effect, to make a court of Quarter sessions review the decision of a former court; for it is expressly found by the case that the first sessions, having the objections to the former order brought before their notice, refused to make the entry "not on the merits." The second sessions have, in substance, overruled that decision. In *Regina* v. *Church Knowle* (*a*), an order having been quashed, generally, at the instance of the respondents, with the consent of the appellants, the court of Quarter sessions held such quashing conclusive upon an appeal against a second order: and its decision was confirmed by this Court. Although it is not stated in the reports, there probably was a notice of abandonment in that case, as the quashing was by consent (*b*). That evidence cannot be adduced against a former specific entry, appears from *Regina* v. *St. Anne's, Westminster, Re Wood* (*c*).

Lord Denman C. J. The judgment of the sessions was in my opinion right; and the evidence shewed that the first order was in effect not quashed on the merits. The giving notice of abandonment, where a parish feels that it cannot maintain its order, is a very beneficial practice; and, as it has been held necessary that the order should be quashed in order that costs may be

(*a*) 7 *A. & E.* 471.

(*b*) The original case, which has been referred to, does not mention notice of abandonment.

(*c*) Antè, p. 878.

taxed, this practice would be virtually abolished, if such parish were to be withheld from shewing afterwards that the quashing took place without inquiry into the merits. The effect of the whole proceeding should be to place the parties in the same relative situation as before the order was made.

PATTESON J. concurred.

WIGHTMAN J. This is not merely a general quashing, as in *Regina* v. *The Inhabitants of Church Knowle* (*a*); it is a quashing with a special entry; and the meaning of that special entry was clearly capable of explanation.

ERLE J. I think the sessions quite right. Where appellants have taken objections of form, it is very important that respondents should have an opportunity of abandoning their order without concluding themselves.

Order of sessions confirmed (*b*).

(*a*) 7 *A. & E.* 471.

(*b*) Reported by *H. Merivale*, Esq.

See the next case, and the three preceding.

The following case may conveniently be added here.

The QUEEN *against* The Inhabitants of the Township of LEEDS.
(PRESTON *against* LEEDS.)

[*Saturday, November* 13th, 1847.]

An order of removal, and an order of Sessions confirming it, were quashed by this Court, on a case stated for their opinion, because the examination, relied upon as shewing a settlement by renting a tenement, stated that "*rent*," and not "*the rent*," was paid. The respondents again removed the paupers to the appellant parish, which appealed again, relying upon the former judgment in Q. B. as an estoppel. On a case stated by the sessions, confirming the latter order subject to the opinion of this Court, it appeared that, in the former case, the sessions had stated that, if this Court held the objection good, the order of removal was to be quashed "*for deficiency in the examination :*" it appeared also that the judgment of this Court was, simply, that the orders should "*be severally quashed.*" Held:

1. That the respondents were not estopped by the former judgment in Q. B.; but might have shewn (if they had been able) that it proceeded on matter of form only.

2. That the appellants were at liberty, if necessary, to shew by evidence (which the sessions had not allowed them to do) that the judgment turned on matter of substance.

3. That the objection, admitted on the present case to have been as above stated, was substantial and valid.

4. That the quashing of the former orders by this Court, being general in terms, and not explained by evidence, must be deemed a quashing on the merits.

5. That, if the provisional judgment of the Sessions in the first special case could be looked to, the words "for deficiency of the examination" might have been explained by evidence, or by a special entry, to mean a deficiency merely formal: but that, unexplained, they must be taken to import a substantial defect.

ON appeal against an order of Justices (*July* 26th, 1844), removing *Matthew Redmayne* and *Ann* his wife from the township of *Preston*, in *Lancashire*, to the township of *Leeds*, in *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court on a special case.

The case set out the examination, among others, of *Matthew Redmayne*, stating a settlement by renting and paying the rent for a house in the appellant township in 1820 and 1821. Also the examination of the assistant overseer for the *Preston* Poor Law Union, stating a former removal of the paupers, in 1843, from the township of *Preston* to that of *Leeds*, under an order of Justices, which was confirmed by the sessions on appeal, subject to a case, but ultimately "set aside for

informality in the examination (*a*)," whereupon the paupers were brought back, and again became chargeable to *Preston* township. Also the examination of a clerk to the attorney for *Preston* township, who produced the last mentioned case, signed by the chairman, and who deposed as follows. " In the said case it is stated, that, if the Court of Queen's Bench should be of opinion that any of the objections taken by the said appellants, and set forth in the said case, ought to have prevailed at the said sessions, the order of removal was to be quashed for deficiency in the examination accompanying the said order of removal. The said case has since been heard; and the said order of removal has been quashed for deficiency in the said examination, and not upon the merits, the Court of Queen's Bench having so quashed the said order of sessions on account of the word 'the' having been omitted in the said examination." A verified copy of this case was annexed to the examinations. It set forth the grounds of the then appeal, which were: 1. That the complaint before the removing justices did not appear to be made by proper parties. 2. That the examinations were bad and insufficient, as not shewing inhabitancy and chargeability. 3. That everything stated in the examination of *Matthew Redmayne* relating to his settlement might be true, and yet no settlement have been gained by him in *Leeds:* and that the said examination is also bad &c., on account of its not stating facts which shew that a settlement must have been acquired. 4. " That the said examinations are bad and insufficient to support the said order, inasmuch as they do not state the house therein mentioned to have been a separate and distinct

(*a*) *Regina* v. *Leeds*, 5 *Q. B.* 907.

dwelling house bonâ fide hired" &c.; "and inasmuch as they do not state that such house was held, and the rent for the same actually paid, for the term of one whole year at the least, by the said *M. R.*, who is alleged to have been the person hiring the same." (There were other grounds, which it is unnecessary to state). The recited case went on to state several objections taken on the trial of the first appeal, among which were those pointed out by the 1st and 2d grounds of appeal above specified, and a third was the omission to state in *Redmayne*'s examination that "the" rent was paid; the overruling of these objections, subject to the opinion of this Court; and the point submitted to this Court by the then Court of Quarter Sessions which was as follows: "If the Court of Queen's Bench should be of opinion that the aforesaid objections, or any or either of them, ought to have prevailed, the order of removal is to be quashed for deficiency in the examination." If otherwise, the order of removal and order of sessions to be confirmed.

To this case was added the rule made by the Court of Queen's Bench on the hearing, that the order of removal and order of sessions "be severally quashed (*a*)."

The case now stated set forth also the notice of the second appeal, given by the overseers of *Leeds* to those of *Preston*, and the grounds. Those now material were: 1. That the former orders were quashed, as above stated, for the insufficiency of the examination, that is to say on the objection that it did not sufficiently appear by such examination that the house was held, and the rent for the same actually paid by *M. R.* for the term of one whole year at the least.

(*a*) The rule nisi called upon the prosecutors to shew cause why the orders should not "be severally quashed for the insufficiency thereof."

"Wherefore, inasmuch as the last mentioned orders were quashed upon a ground relating directly to the settlement of the said *M. R.* and *Ann* his said wife on the day of the date of the said former order of removal, and no settlement having been gained by the said *M. R.* and *Ann*" &c., "or either of them, in the said township of *Leeds*, on or since the day of the date of the said last mentioned order of removal, nor any such subsequent settlement being alleged in the said order now appealed against, or the examination whereon the same was made, the said quashing of the said former orders is binding and conclusive between the parties as to the place of the last legal settlement of the said *M. R.* and *Ann*" &c.; "and it was not lawful at the time of the making of the order now appealed against to remove the said *M. R.* and *Ann*" &c., "and the overseers" of *Preston* "ought not to have been permitted to allege before the said Justices who made the order now appealed against, nor ought the respondents in this appeal to be permitted on the trial of this appeal to allege, that the settlement of the said *M. R.* and *Ann*" &c.," or either of them, was or is in the said township of *Leeds*. 2. That, the said former order having been made and quashed on appeal as is mentioned in the said examination whereon the said order now appealed against was made, the said special case in the said examination also mentioned was argued in due course of law before the said Court of Queen's Bench, to wit on the 1st day of *May* now last past, whereupon it was then and there adjudged by the said Court of Q. B. that the said two former orders should be quashed; which said judgment of the said Court of Q. B. related directly to the settlement of the said *M. R.* and *Ann*"

&c., "at the day of the date of the said former order of removal, which is the same ground of settlement now in question between the same parties, being the parties to the appeal whereof notice is hereby given; and it is therefore binding and conclusive between them, so far as respects the place of the last legal settlement of the said *M. R.* and the said *Ann*" &c., it not appearing, in or by the present order or examination, that the said *M. R.* and *Ann*, or either of them, have done any act to gain a settlement in *Leeds*, subsequent to the former order.

After reciting other grounds, some of which raised questions of fact, and the rest were not finally insisted upon before this Court, the case went on to shew that, on the trial of the second appeal, at the *Preston January* Sessions for the county of *Lancaster*, 1845, the sessions overruled, subject to the opinion of the Court of Queen's Bench, two objections, to the notice of appeal, examinations and order of removal, which were the subject of questions (1 and 2) at the end of the special case, but were not ultimately pressed in this Court. The respondents proved that the paupers were settled in the township of *Leeds*, in the manner stated in the examination. The appellants then contended that the respondents were estopped and concluded by the former judgment; and, in support of the objection stated in the first and second grounds of this appeal, they called their attorney, who produced, from the Crown Office, examined copies of the rule of Q. B. quashing the former order of removal and order of sessions, and of other documents relating to the former appeal. These were received, subject to questions reserved, and which were the 3d and 4th questions

at the end of this case. The respondents contended, in the first place, that it appeared that the original order, as well as the order of sessions confirming it, was quashed for insufficiency, and that, for any thing that appeared in evidence, the judgment aforesaid might have been given on a matter or matters not affecting the question of the last legal settlement. But the respondents were not called upon to offer, and did not offer, any evidence to shew that the judgment of the Queen's Bench on the case aforesaid proceeded on any point other than that of settlement. The sessions held that, on the case as it then stood, the appellants had not given any evidence to sustain the objections taken in the 1st and 2d grounds of this appeal; but subject to the opinion of this Court on the 3d and 4th questions after stated. The appellants then tendered the evidence of their solicitor, Mr. *Naylor*, as to this part of the case; which was: That he was present in the Court of Q. B. on 1st *May* last, during the whole argument upon and hearing of the said former appeal, and while the judgment of this Court thereon was being delivered; and That he was able, if required, to state the grounds on which that judgment was declared by the Court to be grounded, and the expressions of the Lord Chief Justice in delivering the judgment. On the part of the appellants, the witness was then required to do so; but the respondents objected that the evidence was inadmissible; and so it was held by the sessions, subject to the opinion of this Court on question 5, after stated.

The sessions confirmed the order, subject to five questions. Of the first three, which were not gone into before this Court, question 1. related to the notice of

appeal; 2. to the objections (3d and 4th in the grounds of appeal) affecting the examinations and order of removal (*a*): 3. to the proof of the documents offered in evidence. Question 4. was as follows: If the Court should decide that the documents, or a part of them, were admissible: "Whether the sessions" "should have held the respondents in this appeal to be estopped and concluded by the judgment aforesaid. If this Court should be of opinion that the respondents ought to be estopped, then the order of removal and of sessions in the appeal" (subject to the decision of this Court on the 1st and 3d questions) "to be respectively quashed: But, if this Court should be of opinion that the" sessions "were right in holding the judgment aforesaid not binding, then the order of removal and of sessions, subject to the opinion of the Court on the questions 2dly above, and next hereinafter, stated, to be confirmed." Question 5. "Whether the" sessions "ought to have permitted the appellants to shew by parol evidence the grounds of the decision of the Court on the case in the former appeal. If so, it is admitted on both sides that such decision did in fact proceed on the insufficiency of the examinations on which that order was made, in respect of shewing the settlement of the paupers; and, in that case, if this Court should further be of opinion that the quashing of the former order, on the ground that the examinations on which it was made did not sufficiently shew that the paupers were settled in *Leeds*, was such a quashing as to be conclusive on the question of the then settlement

(*a*) Noticed, with question 1., antè, p. 914. Question 2. raised the point, whether or not the examinations and order of removal shewed an inhabiting within *Preston* township, or within the jurisdiction of the removing justices.

of the paupers between the two townships, then the order now appealed against, and the order of sessions confirming the same, are (subject to the opinion of the Court on the questions 1stly and 3dly above stated) to be respectively quashed. If the Court should be of that (*a*) opinion, then the order of removal and order of sessions to be confirmed, subject to the 2d objection herein before stated."

Cowling, in support of the order of Sessions. It is not proposed to contend that *Naylor*'s evidence was not admissible to shew what this Court said in giving judgment on the former appeal. But that judgment, when explained, does not create an estoppel. The sessions, in the case then sent up, stated that, if the Court should think any one of the objections valid, the order of removal was to be quashed "for deficiency in the examination;" words not well chosen, since they do not apply to the first objection: but it is clear that the justices meant a quashing not on the merits: and, as they submitted the question, this Court (acting merely as assessor to the Quarter sessions) must be taken to have answered it, though the words of the rule are simply that the orders "be severally quashed." This Court may refuse to answer a question from the Sessions, but cannot answer any but that which they submit. [*Coleridge* J. The Sessions used the words "for deficiency in the examination." That might imply a substantial or a merely formal defect: may not this Court now inquire into the ground, as where the quashing is general?] The sessions, here, do not ask for that inquiry: they desire to know merely the effect of the former judgment in this Court, that is, whether it is

(*a*) Sic.

conclusive in law or not. The justices may have been already satisfied that the former decision at sessions was not on the merits: that question was open on the documents, and might well be so decided, according to *Regina* v. *Widecombe in the Moor* (*a*) and *Regina* v. *Landkey* (*b*). *Regina* v. *Ellel* (*c*) may be mentioned on the other side; but perhaps that decision would not now be upheld; and the question arose under different circumstances. And in *Regina* v. *St. Mary, Lambeth* (*d*), the question submitted to this Court was quite different from that which is now before them. Where it appears by the entry at sessions that the Court there may have held a decision to be on the merits, or otherwise, this Court, unless guided by the plainest evidence, will not interpose; *Regina* v. *Kingsclere* (*e*).

R. Hall and *Pashley*, contrà. The present question is, simply, what was the effect of the judgment of this Court discharging the former order of Sessions. That judgment, unexplained, must be taken to have proceeded on the merits: that is, on such grounds of law as were conclusive against a subsequent litigation: for the substantial merits are never submitted to this Court in a sessions case. Those who are interested in renewing the litigation should obtain such an order as will shew that the case was not conclusively decided: this rule, as to an order at sessions, was established in *Rex* v. *Church Knowle* (*g*). [*Coleridge* J. It is argued on the other side that the judgment of this Court, quashing the former order, must be construed with reference to the case then submitted, which shewed that the ses-

(*a*) Antè, p. 894.
(*b*) Antè, p. 905.
(*c*) 7 *Q. B.* 593.
(*d*) 7 *Q. B.* 587.
(*e*) 3 *Q. B.* 388.
(*g*) 7 *A. & E.* 471.

sions quashed for "informality" or "deficiency" in the examinations.] The judgment of this Court on the special case is the judgment of sessions. No record remains with that court after the orders are removed hither. And the sessions cannot, as seems to be contended on the other side, oblige this Court to give a qualified effect to their order appearing on the case sent up. But, further, if it became a question of evidence whether the former order was quashed on grounds which created an estoppel, or not, the respondents, who primâ facie were estopped, should have given the evidence. This is shewn by *Regina* v. *St. Peter's, Droitwich* (*a*). And if the onus of explanation lay on the appellants, they could, if permitted, have shewn, by the testimony of *Naylor*, that the former judgment of this Court did proceed on a ground which made it final. The sessions, here, could have no knowledge to the contrary: the former order of sessions was by a Bench differently constituted; the justices at the present sessions could not legally know how the question then in dispute was determined, unless from the judgment of this Court, explained by evidence, or unexplained. That the former decision did, if the grounds be looked at, finally dispose of the question of settlement, appears from *Regina* v. *St. Mary, Lambeth* (*b*), and *Regina* v. *Ellel* (*c*), and from the language of *Patteson* J. in *Ex parte Overseers of Ackworth* (*d*).

Lord DENMAN C. J. It is clear that the former judgment of this Court between the townships was primâ facie an estoppel. But the respondents, on the present appeal, might have shewn by evidence that it proceeded

(*a*) Antè, p. 886.
(*b*) 7 Q. B. 587.
(*c*) 7 Q. B. 593.
(*d*) 3 Q. B. 397, note (*a*).

on matter of form merely. That was not done. The appellants offered to prove that it was decisive on substance. The sessions, on the former occasion, held that, if the objection prevailed, the order of removal was bad for deficiency of the examinations, but left it open, on the case which they stated, whether the deficiency was in form or in substance. If they meant to decide that it was form, they ought to have shewn this by their finding. If it became a question for this Court whether the defect was substantial or not, the cases clearly point out that it was. How do we know that the statement "I paid *rent*," instead of "*the* rent," was not made from a consciousness that truth did not admit of more? But, however this may be, we can proceed only on the judgment of the Court below, as they have delivered and as they had a right to deliver it: they have affirmed simply that the examination was insufficient, and so have left it at least doubtful whether the objection lay in form or in substance.

COLERIDGE J. I am of the same opinion. The only question now before us turns on the judgments of the Quarter sessions and of this Court on the former appeal. If we look to the judgment of this Court, we quashed the order of removal generally: if to that of the sessions, they quashed "for deficiency in the examination." The appellants, on the trial of this appeal, relied upon the former judgment in the Queen's Bench as conclusive in the first instance. The sessions held it not so, and rightly, nothing appearing on the face of it to shew that it finally determined the settlement. But, the judgment not being conclusive in its terms, the obvious consequence is, that one party to the appeal should have explained that a quashing for form only was in-

tended, or the other that the quashing was really for substance. The former course was not taken; and the sessions would not allow the other, thinking that, under the circumstances, the quashing was, conclusively, a quashing for matter of form. That was decidedly wrong. It is said that the judgment of this Court must be connected with the decision given, subject to our opinion, at sessions. But, if so, it then appears that the latter decision proceeds on "deficiency in the examination:" and the question arises, whether that imports a failure on merits. And the expression, taken by itself, does import a failure of proof on some point material to the question of settlement. The sessions are, since the late act, a court of appeal from the justices who remove (*a*), their inquiry being limited to the specific points on which the adjudication below is impeached by the grounds of appeal: and, in the present instance, that court of appeal, being bound to see that the court below had had all the proper materials before it, could not but notice that the examination, omitting to state that "the" rent had been paid, was deficient in a material fact: and, that being so, they could only decide against the order. In a like case at nisi prius the failure might have been remedied by suffering a nonsuit: at sessions, where that cannot be done, they have a practice of quashing, professedly, for informality. When they do so, this Court will not interfere: but, if they do not adopt that course, and merely hold the case brought before them insufficient, we can only say that the decision is on merits.

(*a*) *Coleridge* J. afterwards explained that, in calling the Sessions a court of appeal under the late act, he did not mean that they were precluded from hearing new evidence.

Erle J. (*a*). As to the fourth question: I think that the respondents were not estopped. As to the fifth: parol evidence was tendered by the appellants to shew the particular ground of the former decision; and it is admitted that, if the evidence was receivable, the ground appears to have been insufficiency of the examination. That the evidence was admissible is clear; and the judgment, on the ground stated, is decisive of the settlement. We may regret that so slight an omission should be held matter of substance; but a series of decisions establishes that it is so: and, that being the case, it is the worst of evils to introduce a doubt. Our judgment must, therefore, be against the present order of Sessions. At the same time I am of opinion that, where the defect consists in such an inaccuracy as this, substantial justice is best done by entering on the minutes of sessions that the order is quashed on form. I cannot concur in the observation of Mr. *Hall*, that merits do not come before this Court on a case from sessions: the statements we have to consider in such a case involve the question of title as much as those which come before us in other ways. That was so here, the point being whether the pauper was settled by having paid the rent of a tenement.

Lord Denman C. J. I do not at all differ from the observation that, in such cases as this, the Sessions ought to make a special entry.

Orders quashed.

(*a*) *Wightman* J., not having paper books, took no part in the decision. See the preceding four cases.

WILLOUGHBY, Clerk, *against* Sir HENRY WILLOUGHBY, Baronet.

DEBT, by the rector of the rectory of *Marsh Baldon*, *Oxfordshire*, for two half yearly payments of a rent charge, awarded to plaintiff in lieu of tithes and glebe, as after mentioned, by *John Maurice Herbert*, Esquire, under stat. 6 & 7 *W.* 4. *c.* 16., private, "for dividing, allotting, and laying in severalty lands in the parishes of *Marsh Baldon* and *Toot Baldon* in the county of *Oxford*" (*a*).

By a private act for dividing and allotting lands in parish *B.*, a commissioner for the purposes of the act was appointed, with power to make an award, and without limit as to time. The act also appointed an arbitrator, whom it authorized and empowered "*to declare by an award under his hand and seal within six calendar months after the passing of this act*," the annual amount of rent charge, on the principle of a corn rent, to be paid to the rector in lieu of all tithes for lands in *B.*: such rent charge to be charged on the lands of *W.* in parish *B.*, in exoneration of the lands of all other proprietors therein. And it declared that, in case the arbitrator should "*die, or neglect or refuse to act, or become incapable of acting*," it should be lawful for the Bishop of the diocese, on petition, to appoint another arbitrator with the same powers as were given to the first; provided that the successor so nominated should make his award within a time to be fixed by the Bishop.

The arbitrator did not make his award within the six months, conceiving that he was not bound, nor in a condition, to do so, till the commissioner had made his, which had not yet been done. The Court being of opinion that he was mistaken in this,

Held: that, although the arbitrator should not have been otherwise blameable, the erroneous omission to make his award in time was a "neglect" to act, and warranted the appointment of another arbitrator.

Semble, that it would not have been a "neglect" if the arbitrator, being unrestricted as to time, had made an award which was invalidated by miscarriage in his proceedings.

The declaration recited sect. 30 of the act, whereby, after stating the expediency of commuting part of the glebe lands, and the tithes of certain other lands, in *Marsh Baldon* for a rent charge on the principle of a corn rent, to be charged on defendant's lands in the parish in exoneration of the lands of all other proprietors therein, it is enacted:

"That *Edmond Gibson Atherley*, Esq., of *Gray's Inn*, Barrister at Law, be, and he is hereby, authorized and empowered to declare by an award under his hand

(*a*) Sect. 1 appointed a commissioner for these purposes.

and seal within six calendar months after the passing of this act (and which award shall be final and conclusive on all parties), the annual amount of rent charge on the principle of a corn rent to be paid to the rector of *Marsh Baldon* and his successors for ever in lieu of all tithes, compositions and moduses issuing and payable from or in respect of all and every the lands and grounds in the parish of *Marsh Baldon*, and also in lieu of that portion of the glebe lands of the said rectory of *Marsh Baldon* which lies dispersed," &c.

Also sect. 31, enacting that the said rent charge shall be, and is by this act, charged on the defendant's lands situate in the parish of *Marsh Baldon*, in exoneration of the lands of all other proprietors of lands in that parish: sect. 32, empowering the arbitrator to determine whether certain lands of defendant in the parish are subject to the payment of any and what tithes to the rector, or of any and what composition or modus, and directing such arbitrator to take such tithes, modus or composition into consideration in estimating the rent charge, and, in certain cases, to confirm the composition, &c.: and sect. 34, enabling him to apportion the rent charge among defendant's lands. Also (after recital of some intermediate clauses) sect. 39, which enacts:

"That in case the said *E. G. Atherley* shall die, or neglect or refuse to act, or become incapable of acting, in the matters hereby submitted to him, it shall be lawful for the Bishop of the Diocese of *Oxford*, by writing under his hand and seal, on the application in writing by the rector for the time being of the said parish of *M. B.* or by the said Sir *H. W.*, his heirs and assigns, owners and proprietors of lands and grounds to be charged with the said rent charge, to nominate and appoint some other fit and proper person to act in the

place of the said *E. G. Atherley*, and so from time to time as often as occasion shall require, and every successor so to be appointed to the said *E. G. Atherley* as aforesaid shall have the like powers and authorities as are hereby given to the said *E. G. Atherley:* provided nevertheless, that such successor or successors so nominated and appointed as aforesaid shall make his or their award within a time to be fixed by the Bishop of the diocese of *Oxford.*"

The count then proceeded (after some further recital of the act, not material to this case): And whereas the said *E. G. Atherley* did neglect to act in the matters so submitted to him as aforesaid, and did not declare by an award under his hand and seal, within six calendar months next after the passing of the said act, the annual amount of rent charge to be paid to the rector of *Marsh Baldon* and his successors, according to the provisions of the said act so made in that behalf as aforesaid, but neglected so to do for the said space of six calendar months next after &c., and whereas also, afterwards, and after the expiration of the said period of six calendar months next after &c., and before the making of the award hereinafter mentioned, to wit on &c., the plaintiff, then being rector of the said parish &c. for the time being, made an application in writing &c.: the count then alleged an application by plaintiff to the Bishop to appoint an arbitrator in lieu of *Atherley;* that the Bishop, in pursuance of the statute, by instrument in writing, &c., appointed *John Maurice Herbert* Esq., a fit and proper person &c., to act in place of *Atherley* in the matters by the said act submitted to *Atherley*, provided that *Herbert* should make his award concerning the matters submitted within six calendar months from the day of the date of the said instrument: that *Herbert* took upon himself

the burden &c., and, within six calendar months &c., made his award, and thereby (after recitals) awarded to the plaintiff, rector &c., and his successors (among other things), in lieu of all tithes belonging to the rector, and issuing from all lands in the parish, and of the portion of glebe lying dispersed &c., and of certain other rights, a yearly rent charge, for non-payment of which the present action was brought.

Plea 1, after setting out the private act at length, proceeded as follows: "As by the record of the said act of parliament, remaining amongst the rolls of parliament of our Lady the now Queen, at *Westminster* in the county of *Middlesex*, appears; and which act he the defendant prays may be enrolled in and amongst the records of this Honourable Court; and it is enrolled accordingly: which said statute, and the enrolment thereof as aforesaid made, being read and heard, the defendant for plea says: That the said *E. G. Atherley* Esq., after the passing of the said act of parliament, to wit on the 22d day of *November* A. D. 1837, by virtue and in pursuance of the powers and authorities to him by the said statute given, made and published his award in writing, under his hand and seal, of and concerning the matters referred to him by the said statute, and of and concerning the several matters which he was authorised and empowered to declare and determine thereby; as by the said award, duly deposited and kept amongst the records of the county of *Oxford* by virtue and in pursuance of the same statute, appears: and the defendant further says that the plaintiff, long before the making of the said application to the said Lord Bishop of *Oxford*, to wit on" &c., "and from thence to the time of making the said application, had notice of the said award of the said *E. G. Atherley* Esq., and submitted and consented

thereto, and acquiesced in and acted upon the same: without this, that the said *E. G. Atherley* neglected to act in the matters by the said statute submitted to him, and neglected for the said space of six calendar months next after the passing of the said act, in manner and form" &c. Conclusion to the country. Issue thereon.

Plea 2. That the Bishop did not, in exercise of the powers to him in that behalf given, nominate and appoint *Herbert* in place of *Atherley*, in manner &c. Conclusion to the country. Issue thereon. Plea 3. That *Herbert* did not duly make and publish his award, &c. in manner &c. Conclusion to the country. Issue thereon. There was a fourth plea, which was demurred to; see *Willoughby* v. *Willoughby*, 4 *Q. B.* 687; and a fifth, not now material; see *Willoughby* v. *Willoughby*, 6 *Q. B.* 722.

On the trial, before Lord *Denman* C. J., at the sittings in *Middlesex* after *Trinity* term, 1843, it appeared that Mr. *Atherley* did not make his award till *November* 22d, 1837, the act having received the Royal Assent on *July* 4th, 1836; that he deemed it impracticable to make his award within the six months, because the commissioner appointed under the local act had not made his, and consequently the allotments were not set out: and that he considered the delay on his part justified by that of the commissioner (*a*). The local act did not prescribe any limited time for the making of the commissioner's award. Some time after Mr. *Atherley* had executed his award, the plaintiff petitioned the Bishop to appoint an arbitrator in his stead, on the grounds that *Atherley*'s award was void, as made too late, and was also invalidated by miscarriage on the part of the arbitrator. The Bishop appointed

(*a*) He also stated, as a reason, that the plaintiff had not (though requested to do so) supplied him with requisite information.

Mr. *Herbert*, who made the award now declared upon. The Lord Chief Justice stated to the jury as, substantially, the only point for their decision, whether *Atherley* had neglected or refused to act in the matters submitted to him: and his Lordship expressed his opinion that the term "neglect," in sect. 39, implied something blameable (*a*); and that *Atherley*'s delaying to make an

(*a*) By a short-hand note, this part of the summing up appears to have been as follows.

"It is a question for you to say whether, in point of fact, he" (*Atherley*) "neglected to act; putting a construction on the word 'neglect' which shall import some degree of blame in him in not doing it within that time: because it would have been very easy to put a proviso of time to the act of parliament if it was meant to confine a good award to six months: it would have been very easy to say that an award shall be binding on all parties, provided it shall be so made; that is the common language employed in acts of parliament of this sort: but it is not employed here; and, when another person is placed in his situation, that person is empowered to act upon Mr. *Atherley*'s dying, or neglecting or refusing to act, or becoming incapable of acting in the matters hereby submitted to him. And it would rather seem to me, if that took place by reason of nothing that can be properly called a neglect on his part, his power might continue after the time, and he might make a good award. For instance, supposing either of the parties were extremely ill, or beyond the seas, or that evidence could not be produced in a proper manner, or by accident or other circumstances, then it seems to me that the power given to the Bishop of *Oxford* to appoint a new arbitrator would not arise, because in that case the first arbitrator, Mr. *Atherley*, could not be truly said to have neglected to act: on the contrary, if he was proceeding to collect all the evidence that he could reasonably obtain, and more particularly if the party now complaining did not choose to bring his evidence before him, it seems difficult to suppose that he should be able to say, 'Now I think your award is good for nothing, and I treat it as a nullity, because you neglected to do that which my conduct has prevented you doing.' It seems to me to be a question for you to determine, whether or not Mr. *Atherley*, in that sense of the word, not doing his duty as he should have done, has neglected to make an award in the matters submitted to him by the act of parliament." Having then adverted to part of the evidence, his Lordship appears to have proceeded: "There are other circumstances, in Mr. *Atherley*'s own evidence, from which the learned counsel for the plaintiff contends you cannot say he did not neglect to make his award, and that the award which he did ultimately make is no award at all, and must be considered as bad from

award because the commissioner had not made his award because the commissioner had not made his was not such a blameable acting as, in his Lordship's opinion, constituted a "neglect." He also stated to them that it might be a neglect if the arbitrator had made an award which, by reason of incorrect proceeding on his part, did not bind the parties; and he requested their opinion on the facts bearing upon this point. He further left it to them to say, on the evidence, whether any defect of this latter kind, if existing, had been waived by acquiescence. Verdict for plaintiff on the first three issues; for defendant on the last issue, upon the replication to the fifth plea.

Thesiger, in *Michaelmas* term, 1843, obtained a rule nisi for a new trial on the grounds of misdirection and that the verdict was against the evidence. In *Michaelmas* term, 1844 (*a*),

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the circumstances under which it was made; and therefore, if he neglected to make a good and binding award, that would be a neglect to act in the matters referred to him by the act of parliament; and upon that I am going to take your opinion." He then discussed these parts of the evidence, and added, with reference to them: "It is for you to say whether you think there has been any good award made at all by Mr. *Atherley*; because, if not, he has neglected to make his award, and to act in the matter referred to him by the act of parliament." And, after noticing some evidence of supposed acquiescence, his Lordship appears to have said: "Upon the whole, the subject upon which I wish your opinion is, whether in fact Mr. *Atherley* neglected to act in making his award in the matters referred to him by that act of parliament: that is, whether you think he improperly passed over the time when he ought to have done it, and that he has made such an award as is not binding on the parties at all; for, if he has done that, he has neglected to act in the manner the act of parliament requires he should act; and in that case he would have neglected to make his award, and the appointment of Mr. *Herbert* in his place would be good, and the plaintiff would be entitled to your verdict on that issue."

(*a*) *November* 18th. Before Lord *Denman* C. J., *Williams*, *Coleridge* and *Wightman* Js.

Watson and *Hugh Hill* shewed cause. First, even if that part of the direction of which the defendant complains be incorrect, the plaintiff is nevertheless entitled to retain the verdict, because the mere circumstance of not making an award within six months was a neglect; and the direction, in this respect, cannot be supported. *Atherley* was exercising a limited authority; and at the end of six months that had expired. The case is like the ordinary one of a reference to an arbitrator so that he make his award by a given day. An implied possibility of extending the time is inferred from the supposed necessity that the commissioner should have made his award first: but no such necessity existed; for the rent charge was to be assessed on all the defendant's lands in *Marsh Baldon*, in exoneration of the lands of all other proprietors in the parish; the particular allotments which the commissioner might make were immaterial. The strictness now contended for was adopted in the construction of an inclosure act in *Doe dem. Nicholson* v. *Middleton* (*a*), which is, in principle, an authority here. To say that there must be a culpable neglect is putting an unwarranted limit on the act, and one which it would be difficult to fix correctly. The words of sect. 30 as to time are imperative, as the words of the Highway Act, 13 *G.* 3. *c.* 78, sects. 19, 69, were held to be in *Davison* v. *Gill* (*b*). The intention that they should have that effect appears from sect. 39, giving direction as to the award to be made in case of *Atherley*'s death or neglect, where an express proviso is added, that the successor shall make his award "within a time to be fixed by the Bishop." Secondly, the arbitrator neglected to make his award if by reason of miscarriage on his

(*a*) 3 *Br. & B.* 214.

(*b*) 1 *East*, 64.

part (as to which the jury were properly called upon to decide) the award he ultimately made was not binding: and, if he neglected to make his award, he neglected to act. (The arguments as to the proof of miscarriage, and its effect, are omitted.) This view appears correct, if the traverse only, in the first plea ("without this, that that the said *E. G. A.* neglected" &c. for six calendar months), be taken into consideration. But the inducement avers that *Atherley*, in pursuance of his powers, "made and published his award" of and concerning the matters referred. The inducement ought to contain, in substance, the answer formally given by the traverse; *Stephen on Pleading*, 212, 5th ed.: and an inducement satisfying this rule so far limits the traverse that, to prove the traverse, the inducement must be proved; *Wilson* v. *Craven* (*a*). The doctrine on this subject is also discussed in *Craven* v. *Sanderson* (*b*). Then, to prove the first plea, the defendant was bound to shew that *Atherley* made an award: but that means a good award: *Gisborne* v. *Hart* (*c*).

Sir *F. Thesiger*, Solicitor General, *Cowling* and *Montagu Smith*, contra. If the direction as to six months in sect. 30 be imperative, that objection is on the record. The excuse really offered by the inducement to plea 1 is that the plaintiff acquiesced in the award; if the inducement ought to contain the substance of the traverse, the plaintiff might have demurred on this ground. The real question is, what is meant, in the issue on that traverse, by neglecting to act, and whether the question upon it was properly left to the jury. The

(*a*) 8 *M. & W.* 584. 593. (*b*) 4 *A. & E.* 666.
(*c*) 5 *M. & W.* 50. See *Dresser* v. *Stansfield*, 14 *M. & W.* 822.

delay of the inclosure commissioner was good ground for delay in making the award as to commutation of tithe. Division of the lands was the primary object of the statute; the fixing of a corn rent in lieu of tithe was only subsidiary. Accordingly, the limitation of time for the latter proceeding is not made in peremptory words. The arbitrator is "authorized and empowered" to award "within six calendar months:" the power is not given him with the words "so that," which are words of condition; *Litt. s.* 329: the language is directory. *Doe dem. Nicholson* v. *Middleton* (*a*) was a very different case; there the statute appointed three commissioners, and declared that the act of any two of them should be as valid as if done by all; but two acted when there were no longer three in existence. In *The Conservators of the River Tone* v. *Ash* (*b*), where it was held that a navigation act obliged the company therein named to contract with the Conservators within three months, *Bayley* J. laid stress on the word "required." The object of the present enactment is to settle public rights; it is necessary that the intention of the legislature should be carried into effect: and, in such a case, provisions as to time are held directory only; *Rex* v. *The Mayor of Norwich* (*c*): the omission or unavoidable failure of the party charged with a duty is not allowed to defeat the public purpose. *Bosanquet* v. *Woodford* (*d*) also bears on this point. If the time for making the award is not peremptorily fixed, it cannot be said that the arbitrator is in any default unless he has been requested to make it by the parties interested; *Curtis* v. *Potts* (*e*). Here no

(*a*) 3 *Brod. & B.* 214.
(*b*) 10 *B. & C.* 349. 381.
(*c*) 1 *B. & Ad.* 310.
(*d*) 5 *Q. B.* 310.
(*e*) 3 *M. & S.* 145.

request is shewn; and the award actually made by *Atherley* appears to have been acquiesced in for a considerable time. The real question here is, not whether Mr. *Atherley* made an award within any given time, but whether he neglected to act; the word "neglect," in sect. 39, accompanied by the words "shall die" or "refuse," or "become incapable," implies such a neglect as may be deemed final. No objection being raised on the record, it was for the jury to say, under the direction of the Lord Chief Justice, whether the arbitrator's conduct in not making an award amounted to a neglect of this kind. The evidence shewed not a neglect to act, but an acting. Secondly. Partial or irregular conduct in the arbitrator, even if proved, could not support the allegation of a neglect within the meaning of the act or of the plea. If the limitation of time be out of the question, an award was made: and the party dissatisfied might have tried the right by a feigned issue. This is expressly authorised by sects. 14 and 33(*a*). (The further argument on this point is omitted. The defendant's counsel cited note (3) to *Veale* v. *Warner* (*b*), and *Grazebrook* v. *Davis* (*c*). Also, as to the effect of the inducement, *Negelen* v. *Mitchell* (*d*).)

Cur. adv. vult.

Lord DENMAN C. J., in this term (*January* 19th), delivered the judgment of the Court.

This was an action of debt for money payments alleged to be due from the landowner as compensation for tithes to the plaintiff, who was rector of the parish, by virtue of an award made under an inclosure act.

(*a*) It has not been considered necessary to set them out.

(*b*) 1 *Wms. Saund.* 327 *a.*

(*c*) 5 *B. & C.* 534.

(*d*) 7 *M. & W.* 612.

The verdict passed for the plaintiff on the three first issues, raised by the three first pleas; and a rule was granted for a new trial on the ground of misdirection. The question was argued upon the first issue only.

The declaration shewed that, under the inclosure act, an arbitrator, Mr. *Atherley*, was named, who was authorised aud empowered to make his award within six months after the passing of the act. It is alleged that he neglected to act in the matter submitted to him, and did not make his award within the six months, but neglected so to do for the space of six calendar months. It then averred the appointment of another arbitrator, Mr. *Herbert*, by the Bishop of *Oxford*, under the provisions of the act, and the making by him of the award declared upon. The first plea, after an inducement that Mr. *Atherley*, on a day laid under a scilicet, and in pursuance of the act, published his award, of which the plaintiff had notice, and to which he submitted, and acted on it, concluded with a special traverse; without this, that *Atherley* neglected to act in the matters submitted to him, and neglected to make his award within six months; on which the issue was taken.

Upon the evidence it appeared that *Atherley* had not made any award within the six months; but that he subsequently had made a bad one; this was for some time acquiesced in by the plaintiff; but ultimately the Bishop was applied to to appoint, and did appoint, another arbitrator, who had made the award now declared on. It was contended for the defendant at the trial that, under the provisions of the act, *Atherley* could not make his award until the Inclosure Commissioner had made his; he was not limited in point of time, and in fact had not made his award within six months.

On this question, it appeared to me at the trial that the word *neglect* imported some degree of blame; that that issue could not be proved without shewing *Atherley* to have done wrong; and that he did nothing wrong in suffering the six months to elapse, because it was assumed that he could not make his award till the Inclosure Commissioner should have made his, for doing which the time was unlimited. I thought also that his making an award, after the six months, which was bad for some inherent defects, was a neglect which authorised the Bishop to appoint another arbitrator. But the view now taken by my brothers *Coleridge* and *Wightman*, who have heard the case, is, that Mr. *Atherley*, in permitting six months to elapse without making an award, has neglected to make one within the meaning of the act. In this view I concur. The consequence is that the Bishop's power to appoint another arbitrator attached: Mr. *Herbert* was well appointed; and his award is binding.

If, then, a new trial took place, the Judge would be bound to direct the jury that the plaintiff was entitled to the verdict on the proof of facts which are not nor can be disputed. The defendant, however, has a right to question this direction: and we would suggest, for saving expense and further delay, that he should now be at liberty to tender a bill of exceptions, and have the same opportunity of arguing it on a writ of error as if our present opinion had been declared at the trial, and the jury directed accordingly. Unless this is agreed to,

Rule absolute (*a*).

(*a*) No further proceeding has hitherto been taken.

COOKE *against* Sir WARWICK HELE TONKIN.

Defendant was, by his consent, a member of the provisional committee of a projected company. According to the prospectus, the affairs were to be under the controul of a managing commitee. A managing committee was appointed; and then the provisional committee ceased to act. After this, the solicitor to the Company, who had been appointed by the provisional committee, gave orders for the publication of advertisements. In an action against defendant for the expense of inserting these, it was proved that he had twice attended meetings of the provisional committee, but that he was not on the managing committee, nor a shareholder.

Held, that these facts constituted no evidence for a jury of the defendant having authorised the insertion of the advertisements, nor of his liability.

DEBT. The first count charged that the defendant was indebted to the plaintiff in 50*l.* for the inserting, printing and publishing of divers advertisements in newspapers by plaintiff for defendant, at his request. There was also a count on an account stated.

Plea: Nunquam indebitatus.

The particulars of demand were as follows:

"1845.

		£	s.	d.
Nov. 1.	To advertising prospectus of *The Oxford, Thame, High Wycombe and Uxbridge Junction Railway*	4	0	0
8.	Ditto ditto - -	4	0	0
	Notice to applicants for shares -	0	12	6
	Notice of application to Parliament	3	0	0
15.	Ditto ditto - -	3	0	0
22.	Ditto ditto - -	3	0	0
	Fifteen papers - - -	0	6	3
		£17	18	9"

The case was tried before the Undersheriff of *Middlesex*, 23d *July* 1846. It appeared that the plaintiff was the proprietor of a newspaper called *The Oxford Chronicle*, in which the advertisements had been inserted. They were inserted in consequence of an order given by an attorney named *Gell*. A company, for forming "*The Oxford, Thame, High Wycombe and*

Uxbridge Junction Railway," had been projected in *August* or *September* 1845; to which Company the advertisements related. Evidence was given to shew that the defendant, early in *October*, had consented to be a member of the provisional committee, and a prospectus was issued in which his name appeared as a member of such committee. The prospectus stated that, "until the act shall be obtained, the affairs will be under the controul of a committee of management." Mr. *Gell* was appointed solicitor to the Company, by the provisional committee. The defendant attended twice, in the early part of *October*, as a member of the provisional committee: but on the 10th of *October* a committee of management was formed; after which the provisional committee never acted. The defendant was not on the committee of management; nor was he a shareholder. His name appeared in the advertisements for which the action was brought, as a member of the provisional committee. No list of a managing committee appeared in these advertisements. The counsel for the defendant thereupon contended that there must be a nonsuit, for want of proof of authority from the defendant. The Undersheriff refused to nonsuit, and left it to the jury to say whether the defendant had authorised the act of *Gell*. Verdict for plaintiff.

In *Michaelmas* term, 1846, *Phinn* obtained a rule nisi for a new trial, on the ground of misdirection. In this term (*a*),

Maynard shewed cause. It will be attempted, on the other side, to throw the liability either on *Gell*, the attorney who gave the actual order, or on the managing

(*a*) *January* 11th. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

committee. Now, *Gell* acted as agent: and, primâ facie, where an attorney acts as agent he is not personally liable; *Robins* v. *Bridge* (*a*), *Hartop* v. *Juckes* (*b*): though this may of course be met by evidence of usage, as in *Scrace* v. *Whittington* (*c*). The question must, at the least, be for the jury. In *Reynell* v. *Lewis* (*d*) and *Wyld* v. *Hopkins* (*d*) it was held that a party did not, by merely allowing his name to be published as a provisional committee man, become liable for work done or goods supplied on the order of the company's solicitor: but that, if he acted, it was a question for the jury whether he gave authority to pledge his credit. But, where a provisional committee man has attended meetings, and acted, he is liable; *Barnett* v. *Lambert* (*e*). Here the defendant did attend meetings. Some stress may be laid on the fact that the prospectus states that the affairs will be under controul of the committee of management, of which the defendant was not in fact a member. But that committee had clearly power to act for all, and to pledge the credit of the members of the provisional committee. *Bell* v. *Francis* (*g*) shews that a party who is not a director may be liable for work done by order of the directors, if he interfere in the management: and that rule was admitted by the Court of Exchequer in *Pitchford* v. *Davis* (*h*). The question is, not to whom the credit is given, but with whom the contract is made; *Low* v. *Wilson* (*i*). The plaintiff

(*a*) 3 *M. & W.* 114. (*b*) 2 *M. & S.* 438.
(*c*) 2 *B. & C.* 11. See *Maybery* v. *Mansfield*, antè, p. 754.
(*d*) 15 *M. & W.* 517. (*e*) 15 *M. & W.* 489.
(*g*) 9 *C. & P.* 66. (*h*) 5 *M. & W.* 2.
(*i*) Sittings in *Trinity* term 1846, coram *Parke* B.; cited 15 *M. & W* 523. Reference was also made to a case of *Banks* v. *Good*, in which *Pollock* C. B. had, at Nisi Prius, recognised *Low* v. *Wilson*, and ruled in conformity with it.

here must have acted for the provisional committee: there is no evidence that he had notice of the appointment of any other managers of the undertaking. In the prospectus issued the names of the managing committee did not appear. The principle, that a party, by acting in the management, or even impliedly sanctioning the acts of those who do manage, is liable, in default of some act of renunciation, for contracts made on behalf of the undertaking, appears from *Doubleday* v. *Muskett* (*a*), *Burls* v. *Smith* (*b*), *Glenester* v. *Hunter* (*c*), *Steigenberger* v. *Carr* (*d*) and *Lake* v. *The Duke of Argyll* (*e*). It will be argued, on the other side, that there is no recognised legal meaning in the title of "provisional committee," and that it does not appear in stat. 7 & 8 *Vict. c.* 110.: but it does appear in schedule (C.), where it must mean those who have the temporary management.

Phinn, contrà. This is a question of fact, which the jury can decide only according to the rules of law. The business done was not such as an attorney, in the ordinary course of his duty, could be authorized to order for his employer: the plaintiff was therefore bound to shew that the defendant had in some way authorized the contract. In *Story on Agency*, 81, ch. vi. § 106., it is said: "By far the largest portion of incidental powers is deduced from the particular business, employment, or character of the agents themselves. Whatever acts are usually done by such classes of agents; whatever rights are usually exercised by them; and whatever duties are

(*a*) 7 *Bing.* 110.
(*b*) 7 *Bing.* 705.
(*c*) 5 *C. & P.* 62.
(*d*) 3 *M. & G.* 191.
(*e*) 6 *Q. B.* 477.

usually attached to them; all such acts, rights, and duties are deemed to be incidents of the authority confided to them in their particular business, employment, or character. These, indeed, are in some cases so well known and so well defined in the common negotiations of commerce, and by the frequent recognitions of courts of justice, as to become matters of legal intendment and inference, and not to be open for inquiry or controversy. In other cases, indeed, they may be fairly open, as matters of fact, to be established by suitable proofs." Therefore, if a party professes, as solicitor, to pledge the credit of his client in a case where, merely as solicitor, he has no authority to give the pledge, he is personally liable; *Burrell* v. *Jones* (*a*). The question no doubt is, as put on the other side, with whom is the contract made? That is the rule laid down in *Todd* v. *Emly* (*b*). But here nothing appears to make the defendant a contractor. At the utmost, he is merely a general patron of the undertaking, a character pointed at in stat. 7 & 8 *Vict. c.* 110. *s.* 65.; in which statute, the interpretation clause, sect. 3, describes directors and promoters as parties conducting or acting. There may possibly be a difficulty in reconciling all the decisions. Many are collected in the earlier case of *Fox* v. *Clifton* (*c*). In the later case of *Fox* v. *Clifton* (*d*) *Tindal* C. J. pointed out that the question of partnership, though abstractedly one of fact, must be decided under the direction of the judge, where it depends on the legal result of documents,

(*a*) 3 *B. & Ald.* 47. See *Harper* v. *Williams*, 4 *Q. B.* 219.; *Jones* v. *Downman*, 4 *Q. B.* 235, note (*a*); *Downman* v. *Williams*, 7 *Q. B.* 103.

(*b*) 8 *M. & W.* 505. See *Same* v. *Same*, 7 *M. & W.* 427., 9 *M. & W.* 606., 11 *M. & W.* 1. And see *Todd* v. *Stewart*, antè, p. 759.

(*c*) 6 *Bing.* 776.

(*d*) 9 *Bing.* 115. 117, 8.

or of acts done by others than the persons whose supposed partnership is in question. In *Bell* v. *Francis* (*a*) the language of Lord *Denman* C. J. was only that parties, not directors, may make themselves liable "if they interfere in the management, and hold themselves out as persons giving the order." Here that was not done. This case is nearly identical with *Wyld* v. *Hopkins* (*b*).

Cur. adv. vult.

Lord DENMAN C. J., on a later day in this term (*January* 25th), delivered the judgment of the Court.

A rule was obtained for a new trial in this case, where the under sheriff had submitted to the jury proof that the defendant was a provisional committee man of an intended railway company, and that the plaintiff had executed orders for advertising some matters relating to it; upon which evidence the verdict had been found for the plaintiff.

This evidence was said to be entirely insufficient to call for an answer: and we are of that opinion. The orders had come from a gentleman who held the office of solicitor to the Company: but it did not appear on whose account he had ordered them, or that he had any authority to order them, either from the defendant personally, or from the provisional committee: nor was the work and labour supplied by the plaintiff in the course of any duty belonging to the defendant as solicitor to the committee. Without inquiring into the validity of other objections made on the defendant's part at the trial, we think ourselves bound to make this rule absolute,

(*a*) 9 *C. & P.* 66. (*b*) 15 *M. & W.* 517.

for want of any evidence that the person who employed the plaintiff had any authority, either express or implied, from the defendant.

Rule absolute.

Thursday, January 21st.

The QUEEN *against* CHEEK and SHEKELL, Esquires.

On mandamus, commanding justices to issue a warrant of distress for poor rate against a rated inhabitant, this Court, in the exercise of their discretion, refused to allow the return to be made on his behalf, and framed by him, under stat. 1 *W.* 4. *c.* 21. *s.* 4., the justices opposing, and it appearing that the objections to the rate, relied upon by him, were technical or frivolous and such as, if valid, might have been made on appeal, and that he was actuated by a wish to harass the parish; and he not deposing to his belief in the validity of the proposed objections.

IN last *Michaelmas* term, *November* 24th, by rule of this Court, it was ordered that a mandamus should issue, commanding Mr. *Check* and Mr. *Shekell*, justices of *Worcestershire*, to grant a warrant of distress for levying on the goods and chattels of *John Rodd Griffiths* the sum of 5*l.* 10*s.* 10½*d.*, assessed upon him by a rate made for the relief of the poor of the parish of *Broadway*, in *Worcestershire*, on 12th *September* 1846.

Pashley, on the same day, obtained a rule calling on the prosecutors of the writ and the said justices to shew cause why the return to the writ should not be made in the names of the said justices, but expressed to be made on behalf of *Griffiths*; and why *Griffiths* should not be at liberty to frame such return, and conduct the subsequent proceedings thereon, at his own expense: on notice to the attorneys of the justices and the prosecutors.

From the affidavits on which the rule was obtained the following facts appeared. *Griffiths* was the largest ratepayer in the parish. He was an attorney, and had, in 1845, been employed by the parish of *Broadway* to conduct an appeal against an order of removal: the order was confirmed; and the parish officers of *Broad-*

way caused *Griffiths*'s bill to be taxed by the Master of the Crown Office; when more than a sixth was struck off, and *Griffiths* had to pay the costs of taxation, amounting to 8*l.* 19*s.* 6*d.* On the 7th of *September* 1846, *Griffiths* appeared before three justices of *Worcestershire*, to shew cause why he refused to pay a sum at which he was rated by an assessment for the relief of the poor of *Broadway*, made on 10th of *July* then last: and the justices dismissed the information, on the ground that the notice of publication of the rate was informal. Afterwards a person named *Tustin*, not a parish officer, made out a fresh rate, and obtained separately the signatures of the two churchwardens, and the mark of one of the two overseers, to the usual declaration, the three not having met together, and the other overseer not having had notice of any meeting, or been requested to sign, but having been ignorant of the intention to make the rate until he saw notice of the allowance. The rate was dated 12th *September* 1846; and it was afterwards taken to two justices of *Worcestershire*, not sitting together in petty sessions, but separately, and their signatures were severally obtained to the allowance. In the rate there were one hundred and twenty one persons who were therein stated to be excused from payment of rates on account of their poverty; and no sums were placed against their names. The column intended for the number of votes, and two others in the rate respectively headed "arrears due, or if excused" and "not recoverable or legally discharged," were left blank in the rate. *Griffiths*, on 5th *October* 1846, appeared before Mr. *Cheek* and Mr. *Shekell*, two justices of *Worcestershire*, to shew cause

why he refused to pay his proportion of the rate of 12th *September*.

In opposition, there was put in a verified copy of the affidavit upon which the rule nisi for the mandamus to enforce the rate of 12th *September* was obtained. From this it appeared that the objection to the notice of publication of the rate of *July* had been taken by *Griffiths*. That, on the appearance before Messrs. *Cheek* and *Shekell* on 5th *October*, *Griffiths* contended that the rate of *July* was a good rate, and the rate of *September*, being a concurrent rate therewith, illegal; whereupon the justices refused to grant a warrant of distress. That no appeal had been made against either rate. That, at a meeting of the vestry held for the purpose of considering whether a mandamus should be applied for, *Griffiths* signed a written protest against the resolution for such application, "because the rate made on 10th of *July* last is still a good and subsisting rate; and because the rate of 12th of *September* last is illegal, because a concurrent rate."

Affidavit was also now made that, at a vestry meeting of 1st *August*, 1846, *Griffiths* had said that for every pound taken from his bill, it should cost the parish one hundred. Statements, by way of explanation, were also made as to the omissions in the columns of the rate of 12th *September*.

Martin and *Greaves*, on behalf of the prosecutors, now shewed cause. It may be doubted whether stat. 1 *W.* 4. *c.* 21. *s.* 4. applies to any case where the application is not made on behalf of the party (here, the magistrates) to whom the writ is to be directed. The Interpleader act, 1 & 2 *W.* 4. *c.* 58., which is, by sect. 8,

incorporated with the former act, was passed "to give relief against adverse claims made upon persons having no interest in the subject of such claims." The magistrates here oppose the application. At any rate, the Court will, in its discretion, require that the party applying should have a bonâ fide ground for opposing the writ. Here the grounds are frivolous; *Griffith* does not even swear that he believes them to be sound and the affidavits in answer shew that his object is merely to harass the parish.

Chambers, for the magistrates. The magistrates object to being joined with *Griffiths*: they only wish that, if this Court think the warrant ought to issue, there may be a peremptory mandamus, which will protect them under stat. 6 & 7 *Vict. c.* 67. *s.* 3. It cannot be supposed that every person assessed in the rate can have a right to frame this return.

Pashley, contrà. The magistrates will not be joined with *Griffiths*: he applies to conduct the proceedings alone. The rule follows the language of stat. 1 *W.* 4. *c.* 21. *s.* 4. In *Paynter* v. *The Queen* (*a*) this Court allowed a party rated to frame the return to a mandamus issued against the magistrate, though the magistrate himself had actually made a return, which had been demurred to, and he had been ruled to join. It is true that the magistrate there did not object to the application; but he was no party to it. The magistrates here, if the application be granted, will not lose the protection of stat. 6 & 7 *Vict. c.* 67. *s.* 3.: they will

(*a*) 10 *Q. B.* 908.

have that, if there be a peremptory mandamus: and, besides, they will be protected from all the costs of the proceeding, which will fall entirely on *Griffiths* or the prosecutors. There are substantial objections to the rate of 12th *September*. The parish officers had no power to omit persons from the rate on account of poverty: they could only excuse them from paying the sum assessed. [*Erle* J. Is not that a ground of appeal? Would the rate be void if a single party were omitted? And, if not, will the number make any difference?] A rate from which certain selected parties were designedly omitted would be an illegal and void proceeding. That surely would be so if one person only, out of a large number of rateable parties, were rated. The other objection, that the magistrates do not appear to have acted together when the rate was allowed, is also fatal to the rate: a judicial act to be performed by two must be performed by them when together. These objections would justify *Griffiths* in replevying if the warrant issued and a distress were made on him. The Interpleader Act, 1 & 2 *W.* 4. *c.* 58., has been alluded to: would the Court prevent a third party from coming in under that act, because it was sworn that he was litigious?

Lord Denman C. J. The words of stat. 1 *W.* 4. *c.* 21. give a discretion to the Court. I think that, in the exercise of it, we ought not to permit this applicant to be the opponent in the present proceeding. He is called on to pay a rate which he does not say that he believes to be unjust. And he does not depose that the points upon which he insists are important; even supposing that would suffice.

PATTESON J. Under the Interpleader Act, a party who seeks to come in must satisfy the Judge at chambers that there is reason for his claim. So here we must see that there is a bonâ fide claim. If there were, it might be right to allow the party to litigate it. But he does not shew this, and appears to be merely seeking to indulge himself by raising frivolous objections.

COLERIDGE J. Mr. *Pashley* has put the supposition of the objections failing, and a peremptory mandamus issuing: but I think that, even on the opposite supposition, if all the points taken were good, we in our discretion should not encourage the raising of minute objections.

ERLE J. I am of the same opinion. It is important that there should be no delay in raising a poor rate.

Rule discharged with costs.

Friday, November 22d.

NEWTON *against* ROWE, NORMAN and BOODLE.

Where husband and wife have judgment against them, for costs, in an action brought by them jointly, a ca. sa. for the costs against both is regular. And no action lies for suing out the writ and arresting the wife upon such ca. sa., though it appear upon the record that the party suing out and arresting knew of the coverture.

So held, where the first action was for a libel on the wife.

CASE. The declaration stated that plaintiff did heretofore, to wit &c., at &c., marry *Lætitia Frances Henry Ricketts*, now *L. F. H. Newton*, of &c., and thence, to the time of the committing &c., plaintiff and his said wife continued to live together, to wit at &c., as man and wife; whereof defendants afterwards, and before the committing &c., to wit on 15th *February* 1844, had notice: yet defendants *Rowe* and *Norman*, and *Boodle* as their attorney in that behalf, to wit on &c. last aforesaid, contriving &c. to oppress plaintiff, and to deprive him of the comfort, fellowship, &c., of his wife, and to extort from him a certain large &c., to wit 100*l.*, unlawfully, &c., maliciously, &c., sued and prosecuted a certain writ &c., called a capias ad satisfaciendum, against plaintiff and his wife, without any reasonable or probable cause whatsoever, out of &c. (Common Pleas), before &c., directed to the sheriff of *Gloucestershire*, whereby the Queen commanded the sheriff that he should take the plaintiff and *L. F. H. N.*, if they should be found &c. (ca. sa. returnable immediately after execution), to satisfy *Rowe* and *Norman* 73*l.* 18*s.* 6*d.*, which the writ recited that *Rowe* and *Norman* had recovered by judgment in the said Court against plaintiff and his wife, for their costs and charges by *Rowe* and *Norman* laid out and expended in defending a certain action on the case, then lately prosecuted in the said Court by plaintiff and *L. F. H. N.* against *Rowe* and

Norman, together with interest &c.; and the said writ was, before delivery to the sheriff, to wit on &c. last aforesaid, indorsed by defendants with an indorsement stating that *L. F. H. N.* was the wife of plaintiff and resided at &c., and directing the sheriff to levy &c., to wit the said 73*l.* 18*s.* 6*d.*, and interest, besides poundage &c.: and the writ, so indorsed, was afterwards, to wit on &c. last aforesaid, unlawfully, wrongfully and maliciously delivered by defendants to the sheriff, to wit to *J. Y.*, Esq., then being such sheriff, to be executed &c.: And the sheriff, afterwards, to wit on the said &c., in obedience to and by virtue of the writ, took and arrested *L. F. H. N.* by her body, in the dwelling house of plaintiff, to wit &c., and pulled and dragged her &c., and forced her to go &c. to a prison, to wit the common gaol for *Gloucestershire*, and imprisoned and detained her in his custody under colour and by virtue of the writ, to wit in the said gaol and elsewhere, for a long space of time, to wit ten days then next following, and until 24th *February* 1844; when, by virtue of, and in obedience to a certain other writ of &c., called habeas corpus cum causâ, before then, to wit on &c., duly sued and prosecuted out of the last mentioned Court by and on behalf of *L. F. H. N.*, by her attorneys &c., to the sheriff duly directed and delivered, whereby he was commanded to have the body of *L. F. H. N.* &c., together with the day and cause &c., before the Right Honourable *Thomas Erskine*, then one of the justices &c., at &c., immediately after the receipt of that writ &c., to do and receive &c., the sheriff produced the body of *L. F. H. N.* &c., and his return &c., before the Honourable Sir *Cresswell Cresswell*, Knight, then being another of

the justices &c., by whom *L. F. H. N.* was then, on &c., committed (on payment of the fees of the said sheriff for executing the said writ of habeas corpus, to wit 10*l.*) in execution, with the cause aforesaid, to the custody of the keeper of the Queen's prison, there to remain until &c.; who then detained and imprisoned *L. F. H. N.* in the said prison, by virtue of the said commitment, and for no other cause, to wit for the space of two days, until afterwards, to wit on 26th *February* in the year last aforesaid, when the last mentioned justice duly made his certain order &c., to the keeper of the Queen's Prison &c. (order to discharge *L. F. H. N.* forthwith out of his custody as to that action (*a*)). Which said order was made upon hearing counsel &c., on a certain summons &c.: and which discharge, to wit on the said 26th *February*, in obedience to the said order, was accordingly done. Whereby and by means of which premises plaintiff, during all the time aforesaid, to wit from 15th *February* aforesaid to the 26th *February* aforesaid, wholly lost and was deprived of the comfort &c. (alleging damage, including expense).

Plea (the second), by defendant *Boodle*. That heretofore, and after the said intermarriage of plaintiff with *L. F. H.*, and before the time of the committing &c., to wit on 15th *February* 1843, a certain action on the case was commenced and instituted in &c. (Common Pleas) by the now plaintiff and the said *L. F. H.*, his wife, against the now defendants *Rowe* and

(*a*) *Newton* v. *Rowe*, 7 *Man. & G.* 329. See *Newton* v. *Rowe*, 1 *Com. B.* 187.; *Newton* v. *Boodle*, 3 *Com. B.*, 795.; *Same* v. *Same*, 4 *Com. B.* 359., and 5 *Com. B.* 206.

Norman, to recover damages for and on account of a certain alleged libel upon the said *L. F. H.*, alleged to have been composed and published, by defendants *Rowe* and *Norman*, of and concerning *L. F. H.*, to the alleged damage of the now plaintiff and *L. F. H.*, his wife: And that such proceedings &c., that afterwards, to wit on 24th *June* 1843, it was, in the said action, considered by the said Court that the now plaintiff and *L. F. H.*, his wife, should take nothing by their said writ, but that they should be in mercy &c.; and that defendants *Rowe* and *Norman* should go thereof without day &c.: and it was further considered by the said Court that defendants *Rowe* and *Norman* should recover against the now plaintiff and *L. F. H.*, his wife, 73*l.* 18*s.* 6*d.* for their, the defendants', *Rowe* and *Norman*'s, costs and charges by them about their defence in that behalf laid out and expended, by the said Court then and there adjudged to defendants *Rowe* and *Norman*, &c.; and that defendants *Rowe* and *Norman* should have execution &c., as by the said record &c. And defendant *Boodle* says that, the said judgment being in full force &c., and the said sum of 73*l.* 18*s.* 6*d.*, so adjudged to defendants *Rowe* and *Norman*, being unpaid and unsatisfied, *Boodle*, as lawful attorney of and for *Rowe* and *Norman*, and by virtue of their retainer in that behalf, afterwards, and before the committing &c., to wit on &c., caused and procured to be issued, out of the said Court (Common Pleas), upon the said judgment, a writ of our said Lady the Queen, called a capias ad satisfaciendum, against the now plaintiff and *L. F. H.*, his wife, directed to the sheriff of *Gloucestershire*, by which writ &c. (describing it). Which writ, afterwards, and before the delivery thereof to the

sheriff to be executed, to wit on &c., was duly indorsed with a direction to the sheriff, requiring &c. Which writ, so indorsed, defendant *Boodle*, as such attorney as aforesaid, and as he lawfully might, afterwards, and before the return thereof, and whilst the said money, by the said judgment so adjudged to *Rowe* and *Norman*, and every part thereof, remained due and unpaid and unsatisfied, to wit on &c., delivered to the sheriff, to wit to &c., to be executed &c. By virtue of which said writ, and according to the exigency thereof, the sheriff, afterwards, and before the return of the writ, and whilst the said moneys, by the said judgment &c., remained unpaid and unsatisfied, to wit, on the day and year in the said declaration in that behalf mentioned, being the said time when &c., and within his bailiwick, as such sheriff, that is to say at &c., took and arrested *L. F. H.* the wife &c., by her body, in &c. And, because it was then, to wit at the same time when &c., *L. F. H.* having been so arrested as aforesaid, necessary and expedient in order to keep and detain her in safe custody &c. (justifying under the process).

Special demurrer. Joinder.

Atherton, for the plaintiff (*a*). The case may be taken as on general demurrer; and it is understood that no stress will be laid, for the defendant, on his situation as attorney. The question is, generally, whether a ca. sa. can go against a feme covert for costs in an action in which she and her husband have been plaintiffs. If not, the writ is void, on the face of this record. The exemption

(*a*) The commencement of the argument for the plaintiff was heard on 19th *January*, before the same Judges as those who sat this day.

of femes covert rests on common law principles: the authorities are numerous, but not very precise. As the husband may institute vexatious proceedings, and the wife cannot check him, it would be a hardship if she incurred personal liability: the cases in which she subjects herself to responsibility by her own misconduct differ, therefore, from those where she is joined for conformity. [*Coleridge* J. Then, if it appeared that she had separate personal property, the writ against her would, on your principle, nevertheless be void.] It would. *Blackstone*, in 3 *Com.* 414., says: "Properly speaking, this" (the ca. sa.) "cannot be sued out against any but such as were liable to be taken upon the former capias" (ad respondendum). "If judgment be recovered against an husband and wife for the contract, nay even for the personal misbehaviour, of the wife during her coverture, the capias shall issue against the husband only: which is one of the many great privileges of English wives." In *Hoad* v. *Matthews* (*a*) the marginal note is: "In an action of trespass by husband and wife, if a nonsuit takes place, the wife may be taken in execution for the costs, if she has separate property." That, however, is not a correct abstract of the case, which arose, not on a legal objection to the writ, but on application to the equitable jurisdiction of the Court for discharge of the feme covert: and the order made was that she should be discharged unless it appeared that she had property settled to her separate use. *Patteson* J. there said: "This appears to be the first case which has arisen where the husband and wife have been nonsuited, and the wife has been taken in exe-

(*a*) 2 *Dowl. P. C.* 149.

cution for the costs." If this process were allowable, the wife might be subject to perpetual imprisonment. In *Ex parte Deacon* (*a*) it was held that a feme covert was not under the protection of the Insolvent Debtors' Court. [*Patteson* J. Do you say that, where the judgment is against husband and wife, a ca. sa. against the husband only would be good? Must not the execution follow the judgment?] It cannot go beyond the judgment; but it need not go as far. Suppose a judgment were against a peer of the realm jointly with others, in an action on contract in which all were defendants, and his character appeared on the record: it is clear that there could be no ca. sa. against him; though there would be no objection to a ca. sa. against the others. In *Edwards* v. *Rourke* (*b*) a writ was sued out against husband and wife; non est inventus was returned as to the husband; and, the wife being arrested, she was discharged on motion; *Ashhurst* J. saying, "a feme covert has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life." It is said in 1 *Tidd's Practice*, 194. (9th ed.): "In an action against husband and wife," "if the wife be arrested on mesne process, she shall be discharged on common bail; and that, whether she be arrested singly, or jointly with her husband. But where the wife is taken in execution, she shall not be discharged; unless it appear that she has no separate property, out of which the demand can be satisfied." If she be entitled to her discharge, she ought not to be taken. [*Coleridge* J. Then how do you account for her being obliged to put in common bail on mesne process?] That is merely a formal appearance: the husband used

(*a*) 5 *B. & Ald.* 759. (*b*) 1 *T. R.* 456.

to put in bail for both; 1 *Tidd.* 194. She cannot put in bail; nor can she appoint an attorney. The impossibility of the satisfying the debt is a sufficient reason for her non-liability; as it has been said that, under stat. *West.* 2. (1 stat. 13 *Ed.* 1. *c.* 35.), a feme covert was not liable for ravishment of ward by procuring his marriage, since there the offender, if not able to satisfy for the marriage, was to abjure the realm, or suffer perpetual imprisonment, and she "is not able to satisfy, for a feme covert has nothing during the coverture wherewith she can satisfy, but is disabled by the law to satisfy; and forasmuch as the law has disabled a feme covert to satisfy, the law will not for this disability inflict so great a punishment as perpetual banishment, or perpetual imprisonment, *id est, perdere sive patriam sive libertatem: et lex non cogit ad impossibilia, sed impotentia excusat legem;*" *Doctor Hussey's Case* (*a*), where other instances of excuse on the ground of impossibility are put. [*Patteson* J. Do you say the process is void? Suppose the husband died after judgment.] The judgment would not survive; no process would go against the wife. The wife here is not the cause of the action. [*Coleridge* J. Suppose a justification, and a verdict on it for the defendant.] The wife there would not properly be the cause of the action, merely by having committed that which was charged in the alleged libel. [*Wightman* J. Suppose the husband died before action brought.] The action would then be entirely her's; here the husband is dominus litis. [*Coleridge* J. Applications to discharge a feme covert have often been refused; how is that consistent with the process being

(*a*) 9 *Rep.* 71 *b.* 73 *a.* See *S. C.* (as *Moore* v. *Hussey*), *Hob.* 93. 5th ed.

void?] A defendant's liability to costs is by stat. 23 *H.* 8. *c.* 15. *s.* 1., which gives, in case of a nonsuit, or verdict for the defendant, the same process to the defendant for his costs against the plaintiff as the plaintiff, if he had recovered, would have had against the defendant. The object was to make the remedies for each party co-extensive. But, if the plaintiffs had recovered in their action here, the husband alone would have had the fruits of the judgment. In *Cassidy* v. *Steuart* (*a*) the history of the writ of ca. sa. was much discussed; and the Court clearly held that it could issue only where there could be a capias ad respondendum. Formerly, neither writ lay except in cases vi et armis. In the decisions upon applications to discharge married women, the principle of the process itself has not been discussed. [*Wightman* J. In *Finch* v. *Duddin* (*b*) husband and wife recovered against husband and wife for battery of the female plaintiff by the female defendant: the latter alone was taken in execution; and the Court refused, on motion, to discharge her. Now suppose there son assault demesne had been pleaded, and the verdict had been for the defendants: could not the female plaintiff have been taken in execution? Or do you say that the law is not the same with respect to plaintiffs as with respect to defendants?] The wife here did not appear to be in fault. [*Wightman* J. referred to *Chambers* v. *Donaldson* (*c*).] The common law capias after judgment was a *capias pro fine*, that is, for the fine due to the king; *Com. Dig. Execution*, (B 1.), (B 2.): the plaintiff, when he failed in his suit, was amerced to the king *pro falso clamore*; 2 *Tidd's Practice*, 976. (9th ed.): the modern process for costs has been substituted for

(*a*) 2 *M.* & *G.* 437.
(*b*) 2 *Str.* 1237.
(*c*) 9 *East*, 471.

this, and was probably intended to go no farther. Now the plaintiff's wife here would not have been liable to a capias *pro falso clamore*. Thus, when a feme covert, against whom assize was brought jointly with her husband, on his making default, confessed the ouster and pleaded in bar, and the plea was found against her, still, being a feme covert, she was not imprisoned; 1 *Rol. Abr.* 220. tit. *Amercement* (C), pl. 5. [*Patteson* J. How is that distinguishable from a case of violence by the wife?] In an *Anonymous* (*a*) case in *Cro. Car.*, baron and feme were sued in trespass for an assault and battery by the feme; and, on a verdict of Guilty, it was resolved that the *quòd capiatur* should be against the baron only. This last case is relied on by *Blackstone* in 3 *Com.* 414.: it goes farther than is necessary for the plaintiff here; but it shews, at least, that the liability of a feme covert to be taken in execution was matter of doubt. And, wherever, in the old books, it is laid down that she shall be taken in execution, it will be found that she has been considered to be in some way personally in fault. [*Coleridge* J. In *Cro. Car.* you will find a case of *Mayo* v. *Cogshill* (*b*), where, in *ejectione firmæ* against baron and feme, the baron was found Not guilty, and the feme Guilty: and it was held that a judgment quòd capiantur against the two was right.] There is a somewhat similar case in 1 *Rol. Abr.* 221. tit. *Amercement* (D), pl. 9., where both pleaded Non est factum to a deed of the wife made before coverture, and it was found against them; and it was held that both should be imprisoned. But in each case the feme was personally implicated; as in *Bro. Abr.* tit. *Imprison-*

(*a*) *Cro. Car.* 513. (*b*) *Cro. Car.* 406.

ment, pl. 5., pl. 45. This distinction is illustrated by *Beynon* v. *Jones* (*a*), where the Court of Exchequer held that a feme covert should not be discharged out of execution on a judgment in an action commenced against her *dum sola*, though she had no separate property.

Cowling, contrà. The essence of the complaint is that the plaintiff's wife has been arrested without reasonable or probable cause. But judgment has been entered against the two: the ca. sa. conforms with the judgment: and the Court of Common Pleas has refused to set the ca. sa. aside; *Newton* v. *Rowe* (*b*). There *Tindal* C. J. asked whether it would not have been error if a writ had issued against the present plaintiff only; and he said that the proper course, for disputing the legality of this writ, would be a writ of error. But, while it stands, it justifies all acting under it. Even if the writ had appeared, on the record, to be against a peer, this action would not lie, whatever ground might be afforded for a writ of error; *Countess of Rutland's Case* (*c*). The cases of the class including *Cassidy* v. *Steuart* (*d*) have no application: it was there decided, on motion, that a ca. sa. against a member of the House of Commons, issued during the time of privilege, was irregular; but the question in this action is whether the defendant is liable in an action for taking the plaintiff's wife under the writ, which had not been set aside. In *Holiday* v. *Pitt* (*e*) the defendant, under stat. 12 & 13

(*a*) 15 *M. & W.* 566.

(*b*) 7 *M. & G.* 329. See *Gosset* v. *Howard*, 10 *Q. B.* 411. 453. 454.

(*c*) 6 *Rep.* 52 *b.*; *S. C. Moore*, 765.

(*d*) 2 *M. & G.* 437. See p. 439, note (*b*)

(*e*) [illegible] See p. 959.

W. 3. c. 3. s. 2., was discharged on motion, in analogy to the ancient writ of privilege. [*Coleridge* J. The action here is for suing out the writ: how can the writ itself be an answer to such a complaint?] In *Digby* v. *Alexander* (*a*) *Tindal* C. J. said: "Where a party has privilege of parliament, his remedy, on arrest, is by plea in abatement, or by application for a supersedeas."

But, further, the writ is valid. It conforms with the judgment, as it ought to do; 10 *Vin. Abr.* 553. tit. *Execution* (Q), pl. 4; ib. 554. (R), pl. 2, 4, 5; ib. 555. (T), pl. 1, 2. These last indeed are cases where the feme is a defendant; but, where she is joined as plaintiff with her husband, and they fail, the right of the defendant to costs must rest on the same ground as that of plaintiffs to damages. In *Whiting* v. *Reynel* (*b*) debt was brought against the Marshal for the escape of a feme covert who had been committed in execution upon a judgment recovered against her and her husband: and it was urged that only case lay for the damages, if any, the baron being "the sole and principal debtor:" but the Court held that debt or case lay at the election of the plaintiff, "because the feme was only committed to prison, and not the baron, and she is the sole debtor who is imprisoned:" but it was not suggested that the imprisonment was invalid. In *Berriman* v. *Gilbert* (*c*) the plaintiff recovered against baron and feme on the contract of the feme dum sola; and both were taken in execution: and the Court refused to discharge the feme. In *Pitts* v. *Meller* (*d*) the Court refused (in default of evidence of collusion) to discharge a wife, taken with her husband

(*a*) 9 *Bing.* 412. 414.
(*b*) *Cro. Jac.* 657.
(*c*) *Barnes* 203.
(*d*) 2 *Str.* 1167.

in execution of a judgment in trover against the two. *Finch* v. *Duddin* (*a*), already noticed by the Bench, is a similar case; and it was acted upon in *Langstaff* v. *Rain* (*b*). And in an *Anonymous* (*c*) case in *Wilson*, where a wife was discharged from custody on mesne process in an action against her and her husband, having been rendered by the bail after judgment, it was said that she would not be discharged from execution. The action, it is true, was for the debt of the wife dum sola: but the sheriff cannot know whether this is so or not. It was not a case of personal tort. [*Patteson* J. That case is reported by *W. Blackstone*, as *Roberts* v. *Andrews* (*d*).] In *Wilmot* v. *Butler*, cited in the *Anonymous* (*c*) case, the same rule is laid down without qualification. *Sparkes* v. *Bell* (*e*) and *Beynon* v. *Jones* (*g*) also shew that the ca. sa. may issue against the wife upon a judgment against her and her husband for a cause of action accruing before coverture: in those cases the Court held that the wife was not entitled to be discharged. No distinction in this respect can be shewn between the cases of plaintiffs and defendants. Stat. 23 *H.* 8. *c.* 15. *s.* 1., giving costs to defendants, is extended by stat. 4 *Ja.* 1. *c.* 3. *s.* 2. to all actions wherein plaintiff or demandant might have costs. Here the execution for costs would have been on behalf of both plaintiffs, if they had succeeded. In *Hoad* v. *Matthews* (*h*), though there was a conditional order for the discharge, the arrest must have been considered legal, otherwise the discharge must have been granted of course.

(*a*) 2 *Str.* 1237.
(*b*) 1 *Wils.* 149.
(*c*) 3 *Wils.* 124.
(*d*) 2 *W. Bl.* 720.
(*e*) 8 *B. & C.* 1.
(*g*) 15 *M. & W.* 566
(*h*) 2 *Dowl. P. C.* 149.

In *Ferguson* v. *Clayworth* (*a*) the Court refused to discharge the wife. In *Regina* v. *Johnson* (*b*) a married woman was prosecutrix in the Ecclesiastical Court, and obtained a writ de contumace capiendo, which was set aside by this Court with costs to be paid by the prosecutrix; and, on her non-payment, an attachment was granted against her, absolute in the first instance. It is true that she had prosecuted by herself in the Ecclesiastical Court: but she might, in contemplation of law, and in fact, have done this under her husband's controul. *In the matter of Ruth Cope* (*c*) is a very strong case to the same effect. The argument urged on the other side as to hardship cannot be supported. The Court will not presume that the husband will join the wife improperly: he would incur a liability on his own part; and she acquires a right to the damages if the action succeeds. If the argument on the other side were valid, it would shew that the judgment ought not to be for or against the two. [Lord *Denman* C. J. Or that the husband ought to sue or be sued singly.] The passage cited from 3 *Bl. Com.* 414. is not warranted by the authorities: and it is admitted on the other side that the doctrine laid down by *Blackstone* cannot be altogether supported, inasmuch as it is allowed that the capias will issue against the wife in the case of her personal misbehaviour during coverture. [*Coleridge* J. That passage is cited by Mr. *Atkinson*, in his *Practical Treatise on Sheriff-Law* (*d*): and he adds, in a note, "*English* wives must not suppose this last sentence to be law."] The *Anonymous* (*e*)

(*a*) 6 *Q. B.* 269.
(*b*) 5 *Q. B.* 335.
(*c*) 5 *Q. B.* 336, note (*b*).
(*d*) P. 434. 2nd ed.
(*e*) *Cro. Car.* 513.

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case in *Cro. Car.*, which *Blackstone* cites, is contradicted (as has been pointed out) by a case in the same volume of reports, *Mayo* v. *Cogshill* (*a*), and is also inconsistent with *Hales* v. *White* (*b*). The cases as to the entry of the capiatur pro fine are inapplicable: that proceeding is abolished by stat. 5 & 6 *W. & M. c.* 12. (*c*): and the rules as to a ca. sa. cannot rest upon the same principles. It appears that the arrest of a feme covert even on a capias ad respondendum was not absolutely illegal; *Anonymous* (*d*) case in *Wilson*, *Hoad* v. *Matthews* (*e*), *Robarts* v. *Mason* (*g*): when she was discharged, common bail was put in for her. In *Doctor Hussey's Case* (*h*) the question was as to the judgment, not as to the mode of enforcing it. If the plaintiff be right, there might have been an action in every case in which application has been made to discharge a feme covert.

Atherton, in reply. If it be material whether the feme had separate property or not, the fact that she had should have been averred: primâ facie she has none. The declaration charges that the defendant knew of the marriage; which is not traversed. To say that the writ conforms with the judgment is to assume the question: the plaintiff contends that a judgment against husband and wife does not warrant a ca. sa. against the two. The argument that the writ should be disputed by bringing error rests on a fallacy: the writ is not part of the judgment, which is the language of the

(*a*) *Cro. Car.* 406.
(*b*) *Cro. Ja.* 203.
(*c*) See *Beecher's Case*, 8 *Rep.* 58 *a.* 59 *b.*; *Lyndsey* v. *Clerke*, 5 *Mod.* 285.
(*d*) 3 *Wils.* 124.
(*e*) 2 *Dow. P. C.* 149, 150.
(*g*) 1 *Taun.* 254.
(*h*) 9 *Rep.* 71 *b.*

Court immediately after the *consideratum est*, and merely awards that the defendants shall recover costs against the plaintiffs. The suing out of the writ is the act of the party. Suppose a ca. sa. were sued out against *A.*, *B.* and *C.* on a judgment against *A.* and *B.* only: would *C.* be put to a writ of error before he could bring an action for being arrested? Almost all the authorities cited in support of the ca. sa. rest upon the wife having been personally implicated: in no one does it appear that the fact was otherwise.

Lord DENMAN C. J. This case has been most ably argued: but we entertain no doubt. The question is, whether, under stat. 23 *H.* 8. *c.* 15. *s.* 1., a ca. sa. should go for the defendants' costs against a husband and wife suing jointly. As I read the statute, the same remedy is given for plaintiffs as defendants. Mr. *Atherton* says that a feme covert who is plaintiff has not, in effect, any remedy on the judgment if the action succeeds, and therefore ought not to be personally liable if it fails. But, in truth, the position of the co-plaintiff is the same as that of the co-defendant. Then, what was the position of a feme covert, co-defendant with her husband, at common law? *Blackstone* having expressed the opinion which has been cited, we cannot wonder that some doubt has arisen. But that doubt is quite removed upon a closer examination. He cites an *Anonymous* (*a*) case from *Cro. Car.*, which is not very satisfactory, and a little contradictory. It appears from the report that a battery was done by the feme alone, but both baron and feme were found Guilty (one does not quite see how); and that it was resolved that

(*a*) *Cro. Car.* 513.

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a quòd capiatur (that is a capiatur pro fine, not a ca. sa.) should be entered against the baron only. It is extraordinary that *Blackstone* should have overlooked the case of *Mayo* v. *Cogshill* (*a*) in the same volume of *Croke*, and also the case of *Roberts* v. *Andrews* (*b*) reported by himself. In *Mayo* v *Cogshill* (*a*) the judgment was reversed upon another ground; but the Secondary reported in favour of the entry quòd capiatur, almost in the same terms as those in which the Clerk of the Crown and Secondary reported, in the *Anonymous* (*c*) case, in favour of the capiatur against the baron only. But in *Roberts* v. *Andrews* (*b*) (reported as *Anonymous* (*d*) in *Wilson*) the question was much gone into: and the result appears to be that the Court will interfere in the case of arrest on mesne process, but not in the case of arrest in execution. In the late case in the Exchequer, *Beynon* v. *Jones* (*e*), the law was, I think, laid down quite correctly: and it is there said that "the whole practice of discharging married women, who are in lawful custody on a ca. sa., is of very recent date, and certainly appears to rest on no principle whatever;" but that, in modern times, the Courts have assumed the right of discharging a married woman if she has no separate property. What the Courts have said is, that she shall not be discharged where it appears that she has separate property of her own; that is, substantially; for by strict law she can have none. It does not follow from this that she is to be discharged where it is not proved that she has such property. Here, however, the question is whether the wife is to be taken at all. An old case

(*a*) *Cro. Car.* 406.
(*b*) 2 *W. Bl.* 720.
(*c*) *Cro. Car.* 513.
(*d*) 3 *Wils.* 124.
(*e*) 15 *M. & W.* 566.

was cited from 1 *Rol. Abr.* 220, tit. *Amercement* (C), pl. 5., which it is not easy to reconcile with other cases. For, as my brother *Patteson* asked, how does the confession of an ouster, where the justification fails, differ from the case of personal violence by the wife, in which case she may be taken? It appears to me that it might possibly be a reasonable principle to hold that the wife should not be taken at all, inasmuch as the husband influences all her proceedings. But that principle would go the length of not even making her a party to an action; for which nobody contends. She certainly has a direct interest in the suit; for the remedy, if her husband died, would survive to her. Whether the law on the point now in question be wise, or whether it would have been better to confine the liability to the husband entirely, is not now under consideration. The husband is supposed to protect his wife effectually in a proceeding the benefit of which would survive to her. In all cases, therefore, the right to arrest the wife is recognised. If arrested on mesne process, she is bailed: but bail is an arrest; the practice therefore proves the legality of the arrest. When we talk of the wife being a meritorious cause of action, we are not discussing whether her conduct be good or bad, but whether the merits of the action appertain to her or not: and that we cannot always go into. Various cases may be put: very often the wife may really have set the action in motion, may be the party beneficially interested in the result, may have been guilty of improper conduct: but, as it is impossible to examine such questions in every instance, the law is, generally, that she is liable to be taken in execution where she and her husband are joint parties in an ac-

tion, and fail. We feel no doubt upon the point, and should not be justified in raising any.

PATTESON J. I agree that there is no doubt on this question. It comes to this: whether a married woman, when defendant jointly with her husband, is liable to be taken in execution; and, then, whether the statute 23 *H.* 8. *c.* 15. *s.* 1. gives the defendant the same remedy against her when she is plaintiff jointly with her husband. That she is liable when defendant, is a position against which there is no authority except 3 *Bl. Com.* 414., and the *Anonymous* (*a*) case in *Croke.* But that case related merely to a capiatur pro fine. Wherever the husband is joined for conformity, the pleadings shew that the action relates to the wife. Thus, if a declaration in debt were framed against husband and wife, upon a debt owing from the wife dum sola, the issue denying the debt would be whether the wife was indebted. I do not see how, in an action against husband and wife for an assault, there could be a plea upon the record that the husband was Not guilty, except in the single case of husband and wife having joined in the assault. There is no question that, when the husband and wife are joint defendants, both may be taken. I really, therefore, cannot see what doubt there can be here. There is indeed a distinction in the case of mesne process: there the wife used to be discharged on putting in common bail; but the husband had to put in special bail for himself and his wife. That shews that her arrest was not illegal. Much less then can the arrest be illegal in execution, where the judgment is against the two. Really that is

(*a*) *Cro. Car.* 513.

the whole point. Stat. 23 *H.* 8. *c.* 15. *s.* 1. provides that the defendant shall have judgment for costs. Mr. *Atherton* contends that, because the wife at common law could not be taken under a capiatur pro falso clamore, she cannot be arrested under the substituted process for costs. But I do not find that the words of the statute bear this out: they are quite general, and give to defendants the same remedy as plaintiffs have. Now what remedy would husband and wife, when joint plaintiffs, have, if they succeeded? A ca. sa. or a fi. fa. If the action would have survived to the wife (which is conceded), supposing the plaintiffs to have been successful, why should she not be liable where they fail? Mr. *Atherton* says that the husband would have all the fruits of the judgment. No doubt he might take them, as he might any property of the wife: her interest in the judgment is therefore the same as in any property. So I do not see what doubt there can be. In *Hoad* v. *Matthews* (*a*) I tried to find a case reported on the point, but could not: and, as the counsel who have now looked into the question so diligently have not found any, I presume there is none: I did not, however, mean to express a doubt. The case itself is no authority; because the application there was, not to discharge the party because of the illegality of the process, but to discharge from custody which was legal. The only question was, whether the wife had any separate property to her own use; and she was discharged. But that is matter of indulgence rather than law. It is now attempted to infer from this that such an arrest is illegal; but that consequence by no means follows.

(*a*) 2 *Dowl. P. C.* 149.

I am of opinion that the writ properly follows the judgment, in accordance with stat. 23 *H.* 8. *c.* 15. *s.* 1.

COLERIDGE J. I am entirely of the same opinion. It appears that there has been a judgment in the Common Pleas for costs against husband and wife, under which the wife has been arrested. The question is, whether that arrest is justified. It is true, in one sense, that this depends on stat. 23 *H.* 8. *c.* 15. *s.* 1.: that is, the statute gives the same remedy to defendants as to plaintiffs; but I confess that I do not see how the statute is important in any other sense. As far as it furnishes any inference, it seems to me to be against the plaintiff; for, if there be anything in the argument that at common law a feme covert could not be taken under a capiatur pro fine when plaintiff, the statute gets rid of that by giving the defendant the same process and execution as the plaintiff would have had if successful. I have said so much, in order to dispose of a point to which, as it seems to me, more importance has been given than it deserves. Now we have no precedent of any action of this sort, successful or unsuccessful. That circumstance sometimes proves much and sometimes little: but here it is of immense importance. The books are full of applications to discharge femes covert, some successful and some unsuccessful, but both equally proving that no action was ever contemplated. It is impossible that, where the Courts have rejected such applications, they could have meant that the custody was illegal and that yet the party was to be detained. I was anxious, therefore, to see how counsel would shape the argument. It is not asserted that the arrest is in all cases illegal;

for it seems to be admitted that the writ may constitute a justification to the sheriff or party acting. But it is said that the writ is issued improperly. It is admitted that the wife may sometimes be so personally mixed up in the action as to make the issuing the writ proper: but it is said that, where she has not caused the action to be improperly brought, there the ca. sa. cannot issue against her. But think how inconvenient such a rule would be. When an application was made on affidavit, we might indeed easily inquire into such points: but I do not see how we can determine a question of strict legality upon such grounds. The result, therefore, to which I come, is that there is no real ground for considering the writ illegal. There is a rule, all but universal, that the writ must follow the judgment: it would be idle to cite authorities to establish this. Yet the argument for the plaintiff breaks in upon it, and seeks to shew that the writ ought not to conform to the judgment, on what I may call a fanciful test, ingeniously suggested. There seems to me to be no ground for this action.

WIGHTMAN J. In Mr. *Atherton*'s very ingenious argument, it was suggested that the process was void, and therefore the party executing it liable to action: and I do not see how he could contend for less. For, if the process be merely irregular, the remedy is to set it aside. But it is said that the writ, as far as regards the wife, is wholly void, and that a ca. sa. does not lie against her where she is not the meritorious cause of action. In the early part of the argument, there was an attempt to contend that a ca. sa. would not lie against husband and wife at all: but afterwards it was conceded,

as it must be on innumerable authorities, that it might lie where they are defendants: then a distinction was taken, that a ca. sa. would go against the wife, when defendant, only where she had incurred some degree of culpability; whereas, when she was plaintiff, she might, though entirely innocent, be made amenable for costs by her husband bringing an action which she could not prevent. Now, independently of the difficulty of ascertaining whether or not the wife was so answerable, the words of stat. 23 *H.* 8. *c.* 15. *s.* 1. appear to me to have very great weight. The statute in all cases gives the same remedy to defendants as plaintiffs have. It is said, whether correctly or not, that before the statute there could not be a capiatur pro fine against the wife: and, no doubt, as to this, there appears to be a distinction between the cases of plaintiffs and defendants. It may be that the statute was framed so as to avoid this difficulty, and therefore in general terms made the remedies correlative. And, as to the other ground, I do not feel warranted in allowing the practical distinction. In some cases, it may be that the wife has a greater interest than the husband: she always must have some, so that her cause of action will survive: she is therefore a meritorious cause of the action, and has a direct personal interest during the coverture. Without going through the other points, I think the judgment here must be for the defendants.

Judgment for defendants.

The QUEEN *against* The Inhabitants of MENDHAM.

Wednesday, January 27th.

ON appeal against an order of two justices, whereby *Septima Durrant*, the widow of *William Durrant*, and her four children, were removed from the parish of *Elm*, in the Isle of *Ely*, to the parish of *Mendham*, in the counties of *Norfolk* and *Suffolk*, the Sessions confirmed the order, subject to a case.

On an appeal, the alleged settlement depended on the occupation of a tenement by the pasture feeding of a cow. The cow had been hired of a farmer in the appellant parish, and had been fed in pasture on the farm in that parish during the pasture season, and in the straw yard during winter; and the pasture-feeding was of value sufficient to make up the settlement: but it was expressly found by the Sessions that, at the time of the hiring, nothing was said as to the manner in which, or the particular lands whereon, the cow was to be fed.

Held, that the Sessions were not entitled to infer a contract that the cow should be pasture-fed.

The case stated that the pauper was removed to *Mendham* as the place of her late husband's settlement, he being alleged to have acquired a derivative settlement there from his father, *Charles Durrant*. The examination of the father was set out. He deposed, among other things, as follows. "About thirty two years ago," "I had a cow, and I hired of Mr. *Benjamin Chaston*, the elder, late of *Mendham* aforesaid, farmer, deceased, the keep of my cow upon the growing produce of the pasture land on his farm in the parish of *Mendham* aforesaid, during the pasture season, and its keep in the straw yard, upon hay and straw, during the winter season, at the rent of 4*s*. 6*d*. a week. The cow was depastured under this contract, upon the said *Benjamin Chaston*'s grass lands in the parish of *Mendham* aforesaid, from a little before the 1st of *May*, about thirty two years ago, until a little after the old *Michaelmas* day following." "After the cow went into the straw yard, I rented the keeping of the

cow as aforesaid, under the above contract, for about three years, and paid all the rent for it. During the whole time that I rented the keep of the cow as aforesaid, I was the tenant of, and resided in, the cottage that I now live in, in the said parish of *Mendham*, which was at that time of the annual value of *5l.*, to occupy as tenant thereof. The keep of the cow upon the growing produce of the pasture land, as aforesaid, was, at and for the time I hired it, each year, of the value of *5l.* and upwards. I slept in the house that I so occupied in the said parish of *Mendham* for considerably upwards of forty nights during each of the years that I hired the growing produce of the pasture land to be eaten off by my said cow as aforesaid."

One of the grounds of appeal was, that the said *Charles Durrant* never did hire the keep of a cow in the parish of *Mendham* of *Benjamin Chaston* the elder, as in his examination stated.

On the trial of the appeal, it was proved that, about thirty three years ago, the said *Charles Durrant* went to live in a cottage belonging to *Benjamin Chaston* the elder, who then occupied a farm in the parish of *Mendham*, and worked for him. That, after he had lived in the cottage a year, *Benjamin Chaston* the elder gave up the farm; and it was taken by his son *Benjamin Chaston* the younger. The said *Charles Durrant* continued in the cottage, and worked for *Benjamin Chaston* the younger; and it was after *Benjamin Chaston* the younger had taken the farm, that he hired the cow; and the cow was hired of *Benjamin Chaston* the younger, and not of *Benjamin Chaston* the elder. That the cow was kept, in the pasture season, on the pasture lands of the said farm, which were partly in the said parish of

Mendham, and partly in the adjoining parish of *Withersdale*, and, in the winter season, in the straw yard. That he paid 4*s.* 6*d.* a week for the feed, which, during the pasture season, was worth 5*l.* a year and upwards. That the said *Charles Durrant* put the cow where there was feed for her; but nothing was said, either by his master or himself, as to the manner, or on what particular lands, the cow was to be fed.

It was objected by the appellants that, as the examinations stated the contract for the feed of the cow to have been made with *Benjamin Chaston* the elder, it was not competent for the respondents to give evidence of a contract with *Benjamin Chaston* the younger; and, also, that there was no proof of any contract that the cow should be pasture-fed, or that it should be fed on lands in *Mendham*. The Sessions decided that there was not a material variance; and that there was proof of a contract; and confirmed the order of removal.

If the Court of Queen's Bench should be of opinion that it was not competent for the respondents, under these examinations, to give evidence of the contract for the feed of a cow with *Benjamin Chaston* the younger, or that there was no evidence of any contract that the cow should be fed upon the growing produce of the land or that the cow should be fed on lands in *Mendham*, and that such a variance from the statement in the examinations was fatal, then the said order of Sessions and the said order of removal were to be quashed; otherwise to be confirmed.

Prendergast and *Couch*, in support of the order of sessions. No difficulty arises from the contract (if proved), and the feeding in fact, having extended to

another parish besides the appellant parish; because the value of the tenement in the appellant parish must be considered to be found by the Sessions. As to the contract being with *Chaston* the younger, not *Chaston* the elder as stated in the examinations, the Sessions have decided that the variance is not material, provided the contract be proved; and they are the proper judges as to the materiality of the variance; *Regina* v. *The Justices of the West Riding* (*a*). The question therefore is, whether a contract to feed on the pasture lands was proved: that is a question of fact on which the decision of the Sessions is conclusive, unless there be a total want of evidence (*b*). Here it will be said that no express stipulation appears. But the Sessions were at liberty to infer a contract from the conduct of the parties. In *Rex* v. *Darley Abbey* (*c*) it was stipulated that the pauper should have the milking of a particular cow for the season; nothing was said as to how or where the cow should be fed, except that the agent of the landowner who let the cow was to point out on what pasture she was to be first milked; and, the cow having been pasture fed in fact, the Court held this to be evidence of a contract that it should be so fed. So from service for a year a contract of hiring for a year may be implied; or a hiring of a house from occupation and payment of rent.

Pashley and *Prideaux*, contrà, were stopped by the Court.

(*a*) 10 *A. & E.* 685.

(*b*) See *Regina* v. *Lydeard St. Lawrence*, 11 *A. & E.* 616. 621.

(*c*) 14 *East*, 280. See *Rex* v. *Nacton*, 3 *B. & Ad.* 543., judgment of *Patteson* J.; *Regina* v. *Cumberworth Half*, 5 *Q. B.* 484.

Lord DENMAN C. J. I was counsel in *Rex* v. *Darley Abbey* (*a*), and thought myself ill used because a tenement like this can originate only in contract and cannot be created by mere occupation, and I could not see any hiring. But there, from the declaration that the agent was to point out the pasture on which the cow was to be first milked, an understanding was inferred that it should be fed on the pastures: it became a question of weight of evidence. Here we say, not that the acts of the parties are inconsistent with a contract, but that there is no evidence of the acts having been done in pursuance of a contract.

PATTESON J. It appears that there really was no contract; and the Sessions are therefore wrong. The examinations, it is true, shew a contract: but they evidently give us only what the person who examined put into the mouth of the person examined. The question for us is on the evidence at sessions.

COLERIDGE J. I am of the same opinion. *Rex* v. *Darley Abbey* (*a*) is so clearly distinguishable that it does not interfere with our decision. I should, however, go the length of saying that that case was wrongly decided. The inference there was that what passed at the time shewed an understanding that the cow was to be pasture fed. Here we have it distinctly that nothing was said. In this case, if, the morning after the hiring, the cow had been found in the farm yard feeding on produce brought from fifty miles off, could that have been called a breach of contract? Then the practice is as consistent with a permission given

(*a*) 14 *East*, 280.

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from time to time as with a contract: it is therefore no evidence of a contract; for no fact which is indifferent proves one thing or the other. The hirer might have a reasonable expectation that the cow would be pasture fed; but that is not a contract.

WIGHTMAN J. Certainly *Rex* v. *Darley Abbey* (*a*) closely resembles this case: but there were expressions there from which a contract might be inferred, and which are here wanting.

Order of Sessions quashed.

(*a*) 14 *East*, 280.

Saturday, *January* 30th.

In the Matter of WILLIAMS.

A party convicted in a penalty, under a statute awarding imprisonment if the penalty were not paid, refused to pay, and threatened to proceed against the justices under the habeas corpus act, 31 *Car.* 2. *c.* 2. *s.* 6., if they committed him, alleging that he had before been committed under conviction for the same offence, and discharged on habeas corpus. The justices then refused to commit, but stated their willingness to enforce the penalty if directed to do so by this Court. On motion for a mandamus to the justices to issue a warrant of commitment, This Court, in the exercise of its discretion, refused to interfere, though it was suggested that the former discharge had been for a defect in the warrant of commitment.

JOHN WILLIAMS was convicted, on *November* 10th, 1846, before two justices for *Merionethshire*, of having taken, killed and destroyed a salmon, contrary to stat. 58 *G.* 3. *c.* 43. *s.* 4. (*a*); and a penalty of 5*l.* was awarded against him, which he did not pay. The justices expressed their intention to commit him, under sect. 6 of the statute: but he threatened, if they did so, to proceed against them for a penalty of 500*l.* under the Habeas Corpus Act, 31 *C.* 2. *c.* 2. *s.* 6., inasmuch as he had already been committed to custody (*March* 10th, 1846) under conviction of an offence which he represented to be the same as that now in question, and

(*a*) Amended by stat. 6 & 7 *Vict. c.* 33.

had been discharged by a Judge on habeas corpus. The justices then refused to issue any warrant of commitment, though they had at first given a verbal order that *Williams*, if he did not pay, should be committed to the gaol at *Dolgelly* for two months. But they expressed to the prosecutor of the information a wish that this Court should be applied to, and declared themselves ready to do whatever it should order, to enforce the conviction; saying, also, that they should have committed if they had not been afraid of contravening the Habeas Corpus Act. The defendant not having any goods, no distress warrant issued; and he was suffered to go at large without paying the fine.

Pashley now moved for a mandamus calling upon the magistrates to issue a warrant either of commitment or of distress. He stated the above facts, and also stated that (as would appear from documents annexed to the affidavit on which he moved) the discharge on habeas corpus had been grounded on a defect in the warrant of commitment.

Lord DENMAN C. J. I do not recollect any instance of a mandamus to issue a warrant of commitment on a conviction. The case is not like that of a mandamus to make a rate, or do some other thing without which the affairs of the world cannot go on. The world can go on very well without this proceeding. If we have a discretion, we ought not to grant this writ; and I think we have a discretion. The case is one in which parties may well wait till another offence is committed.

COLERIDGE (*a*) and WIGHTMAN Js. concurred.

Rule refused.

(*a*) *Patteson* J. was in the Bail Court.

Monday, February 1st.

THOMPSON (suing by DAVID ATKINSON as his Guardian &c.) *against* HORNBY.

Where a county had been divided by order in council under stat. 3 & 4 *W.* 4. *c.* 71. *s.* 3. for the purpose of trial of causes, and a party suing in formâ pauperis brought an action, which, by stat. 21 *Ja.* 1. *c.* 12. *s.* 5., was local, in the wrong division, and, discovering the mistake at the assizes, withdrew the record, and obtained leave to amend, the Court, on motion under *Reg. Gen. Hil.* 2 *W.* 4. I. 110., ordered him (though not dispaupered) to pay costs of the day for not proceeding to trial.

THIS was one of two actions of trespass by different plaintiffs, *William Thompson* and *Joseph Atkinson*, against a magistrate of the county of *Lancaster*, for acts done by virtue of his office. Both plaintiffs sued in formâ pauperis, by the same attorney, and laid the venue in the Southern division of *Lancashire* (*a*). At the *Liverpool* Summer assizes, 1846, both causes standing for trial, that of *Atkinson* v. *Hornby* was called on first; when it appeared that the alleged cause of action arose in the Northern division of the county. The defendant's counsel objected that the action, being local by stat. 21 *Ja.* 1. *c.* 12. *s.* 5., ought not to have been brought in the Southern division. On the other side it was contended that the statute only requires the action to "be laid within the county where the trespass or fact shall be done;" and that the division of a county by order in council under stat. 3 & 4 *W.* 4. *c.* 71. *s.* 3., for the purpose of holding the assizes, does not narrow the limit prescribed by the former act. *Wightman* J., who tried the cause, held, after conference with *Cresswell* J., that the order in council was binding; and he directed a verdict for the defendant. The attorney thereupon withdrew the record in *Thompson* v. *Hornby*, and, in last *Michaelmas* term, obtained leave to amend by changing the venue; which was done, and notice of trial given for the next

(*a*) Their attorney, as appeared by his affidavit in opposition to the present rule, was of *Manchester*, which is in the Southern division.

Lancaster assizes. In the same term, the defendant in *Thompson* v. *Hornby* obtained a rule nisi for payment of costs of the day for not proceeding to trial pursuant to his notice.

Knowles now shewed cause. It is true that the Court may, under *Reg. Gen. Hil.* 2 *W.* 4. I. 110. (*a*), require the plaintiff to pay these costs; but it is discretionary, and was so considered in *Doe dem. Evans* v. *Edwards* (*b*). In *Facer* v. *French* (*c*), which may be cited as analogous, the record was withdrawn under very different circumstances. The mistake here was not such as ought, against a pauper, to be visited with payment of costs. [*Wightman* J. Why did not you try in the Northern division, which was obviously the right one? My brother *Cresswell* and I thought this clear. *Facer* v. *French* (*c*) is very much in point: there the pauper withdrew the record under circumstances which made it necessary to amend, as in the present case; and *Williams* J., in the Bail Court, ordered him to be dispaupered.]

Pashley, contrà. The defendant does not move to dispauper, his object being merely to obtain costs of the day under the rule of Court. That he should have those is consistent with long established practice.

Per Curiam. (Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.) The rule must be absolute.

Rule absolute.

(*a*) 3 *B. & Ad.* 390. The rule is: "Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs though he has not been dispaupered." See *Pratt* v. *Delarue*, 10 *M. & W.* 509.; *Foster* v. *Bank of England*, 6 *Q. B.* 878.

(*b*) 2 *Dowl. P. C.* 572., where, however, *Patteson* J. appears only to have enforced *Reg. Gen. Hil.* 2 *W.* 4. I. 69., 3 *B. & Ad.* 383, 4.

(*c*) 5 *Dowl. P. C.* 554.

Monday, February 1st.

The Queen *against* The East Lancashire Railway Company.

A mandamus to a railway company to summon a compensation jury was obtained on affidavits shewing that the applicant had a claim for the value of land in his occupation, taken by the Company, and likewise for damage done to his remaining land by severing it, and had asserted both claims to the Company. By mistake, the rule was drawn up for a mandamus to summon a jury who should assess the value of the land, and omitted to mention damages for severance. The mandamus was drawn, including both, and was quashed on motion, as varying from the rule. The Court refused, on motion, to amend the rule, so as to make it agree with the writ.

But they afterwards, on the original affidavits, and on counsel's statement of the mistake, granted a mandamus including both objects: Lord *Denman* C. J. dubitante.

IN *Hilary* term, 1845, the Court made a rule absolute for a mandamus to the above named Company (then called *The Manchester, Bury and Rossendale Railway Company*), commanding them to cause a jury to be summoned in the manner required by stat. 7 & 8 *Vict. c.* lx., local and personal, public, under which the railway was made, " for the purpose of settling and determining the amount of compensation to be paid by the said Company to *Lawrence Rogers Openshaw* for his interest in a certain piece of land, and the hereditaments and premises, situate in the township of *Bury* in the parish of *Bury* in the said county, in the whole two acres, three roods and twenty two perches, taken by the said Company for the purposes of the said act, and in the notice served on the said Company on behalf of the said *L. R. Openshaw*, on the 27th day of *February* 1845, mentioned and described."

The mandamus issued accordingly. It recited that the Company had given *Openshaw* notice of their intention to take the land in question, part of a larger portion, of which he was the occupier; that, by the taking of such land, part of such larger portion would be cut off from the rest, to the injury of *Openshaw*, for which he had claimed compensation; that the Company had entered upon the land required by them without agreeing with

Openshaw for the said compensation or in respect of his interest in the land; and that he had sustained great loss and damage in his estate "by reason of the matters and things hereinbefore mentioned, and otherwise by reason and in consequence of the works done by you the said Company in the execution of the powers by the said act to you granted." The writ then, after some other recitals, commanded the Company to issue their warrant for summoning a jury to inquire, assess and determine by their verdict "the sum of money to be paid by you the said Company to the said *L. R. Openshaw* for the purchase of his interest in the said portion of of his land so taken by you as aforesaid; *and also the sum of money to be paid by you to him by way of compensation for the injury done to his lands by the severance* therefrom of the portion of land required and taken by you as aforesaid; *and also the sum to be paid* by you to him *by way of compensation for the damage occasioned to the said lands* of the said *L. R. Openshaw* as aforesaid, *by reason and in consequence of the works* done and to be done and executed by you the said Company in the execution of the powers by the said act to you granted as aforesaid."

In *Easter* term, 1846, a rule was obtained calling upon the prosecutor to shew cause why the mandamus should not be quashed; the ground assigned being that the mandatory part of the writ required more than was specified in the rule; or why the defendants should not have further time to make a return. Cause was shewn, on an affidavit by the clerk of the prosecutor's attorney, stating "that it has always been the principal point on the part of the prosecutor, not only to recover compensation for his interest in the said piece of ground so taken by the Railway Company as aforesaid, but

also to be entitled to be compensated for the damage he had sustained by reason of the severance of one portion of his said property from another, as well as by the detriment sustained by the said prosecutor by reason and in consequence of the works of the said Railway Company." "That the writ of mandamus was prepared and settled in pursuance of such intention, and that it was not discovered, until an application had been made to quash, or enlarge the return thereof, that the said rule did not go to the extent originally prayed for," namely, to require an assessment on all the claims. The rule to quash was made absolute, *May* 6th, 1846: and on the same day the prosecutor obtained a rule to shew cause why the rule for a mandamus should not be amended by inserting words corresponding to those objected to in the writ. In the next term (*June* 10th, 1846), *J. Gray* shewed cause (*a*) against this rule, and cited *Regina* v. *Barton* (*b*) and *Regina* v. *The Great Western Railway Company* (*c*). *Archbold* supported the rule; but the Court discharged it.

In the same term (*June* 12th), *Archbold* obtained a

(*a*) Before Lord *Denman* C. J., *Patteson* and *Williams* Js.

(*b*) 9 *Dowl. P. C.* 1021. *Trinity* term (*May* 26th) 1841. In this case, a verdict having been entered for the Crown (*Regina* v. *Barton*, 11 *A. & E.* 343.), *Byles* moved to have the verdict entered on the first two counts, only, of the indictment: but, as he did not bring before the Court the notes of *Park* J., who had tried the case, but was since dead, the rule was discharged, *Mich. T.* 1840. *Byles* afterwards obtained a copy of the Judge's notes, and renewed the application. A rule nisi was granted, *Hil. T.* 1841, on reading the copy, which was verified by affidavit. Cause was now shewn (before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.); and *Regina* v. *The Manchester and Leeds Railway Company*, 8 *A. & E.* 413., was cited. *Byles* urged the peculiar circumstances of the present case, but admitted that the application was ad misericordiam; and the Court held that the general rule as to second applications must prevail. Rule discharged.

(*c*) 5 *Q. B.* 597.

rule nisi for a mandamus calling upon the Company to issue their warrant for summoning a jury to ascertain the purchase money &c., and also assess the compensation for the injury by severance, and the damage occasioned by works done and to be done by the Company &c.; using nearly the same words as those objected to in the former writ. This motion was made on the affidavits filed in support of the former rule for a mandamus, and on the affidavit used, as stated ante, pp. 981, 2., in opposing the rule to quash that writ. *Archbold*, in moving, stated the principal facts above detailed, and admitted that the defect in the first rule for a mandamus might have arisen from his own omission in indorsing the substance of the rule nisi on his brief. The affidavits used on the former application shewed that the prosecutor had, by letter, claimed compensation from the Company for "severance, inconvenience and damage;" and they contained statements of the injury which would be done by the severance of the land, and mentioned "the large amount of damage which, in consequence of the making of the said railway, is and will be done by people trespassing on the remainder of the said land held by this deponent." The affidavits in opposition to the present rule went through the previous proceedings (*a*), and alleged that the present application was "substantially the same" as the motion of *May* 6th

(*a*) The affidavits also set out the notice served by *Openshaw* upon the Company before the first application to this Court, stating that he was "entitled to compensation in respect of an interest in all that piece of land" &c.; that he desired the amount of such compensation to be determined by a jury &c.; that his interest in the said land &c. was a leasehold &c.; and "that the amount of compensation claimed by me in respect of my said interest, and for the injury and damage which I have already sustained and shall sustain by reason of the said piece of land and hereditaments being taken and used by the said railway company, and by reason of the making of the said railway, is the sum of 12*l.*"

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for adding words to the original rule for a mandamus; and was "founded upon no new or additional affidavits, but entirely upon the same facts and matter which were before this honourable Court when the rule nisi" of *May* 6th "was discharged."

Baines and *J. Gray* now shewed cause against the rule nisi for a second mandamus, and objected, first, that the affidavits did not shew a demand and refusal of compensation on the heads secondly and thirdly pointed out by the present application. (It was answered that the notice originally served on the Company was a sufficient demand; and the point was not further discussed.) Secondly, the case is now for the third time before the Court; and the application is substantially the same in its object and grounds as the motion to amend, against which the Court decided in last *Trinity* term. [Lord *Denman* C. J. Counsel had made a mistake in drawing up the rule for the former mandamus. We thought under the circumstances the application might be renewed, and granted the present rule.] It is laid down, in *Regina* v. *The Manchester and Leeds Railway Company* (*a*), as the almost universal and inflexible practice, "that the Court will not allow a party to succeed, on a second application, who has previously applied for the very same thing without coming properly prepared." Here that has now been twice done. [*Patteson* J. The prosecutor was originally furnished with materials; but the rule was not drawn up as at first intended: there was a mistake in the form, by the misprision of counsel, or of an officer of the Court.] In *Regina* v. *The Great Western Railway*

(*a*) 8 *A. & E.* 413. 427. See *Regina* v. *Pickles*, 3 *Q. B.* 599. 601, note (*a*).

Company (*a*) Lord *Denman* C. J. said: "The general rule is that which was laid down in *Regina* v. *The Manchester and Leeds Railway Company* (*b*): the exception is where the alteration would be simply in the form of a title or jurat, and re-swearing the affidavit would clearly leave parties in the same situation in which they were before." In *Ex parte Thompson* (*c*) a mandamus had been moved for on affidavits which did not state a demand and refusal; the rule nisi was discharged on that ground; and then a demand was made, and a refusal given, and a new motion was made on affidavit stating these facts; but the Court held that the case was not taken out of the general principle, and refused a rule. [*Coleridge* J. Has it ever been laid down that, if an application has been made on materials which do not warrant it, there may not be a different application on the same materials?] The application here is substantially the same as before.

Martin and *Archbold*, contrà. The former motion for a mandamus was made on the same materials; but, in consequence of an error, the rule was not drawn up conformably to the intention and to the materials. The application now is only that a rule conformable to them may be drawn up.

Lord Denman C. J. I rather think we ought not to have granted a rule in this case. My brothers, however, take a more liberal view than I do. I think that relaxing the rules of practice does more mischief than enforcing them strictly in a particular case.

(*a*) 5 *Q. B.* 597. 601. (*b*) 8 *A. & E.* 427.

(*c*) 6 *Q. B.* 721. But see *Dixon* v. *Oliphant*, 15 *M. & W.* 152.; *Regina* v. *The Deptford Pier Company*, 8 *A. & E.* 910. 917.

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Patteson J. I do not wish to relax rules of practice: but, where an application comes before us on the same materials with those of a former application, which failed of its object because the rule was wrongly drawn up, we may correct a mistake which possibly may have arisen with our own officer.

Coleridge J. I am of the same opinion, though I am not for extending the rule of practice.

Wightman J. concurred.

Rule absolute.

Monday, February 1st.

Bulmer *against* Bousfield.

A count in assumpsit set forth an agreement of 21st *October*, between plaintiff and defendant, that plaintiff should survey certain lands for an intended railway, and prepare and deposit the plans before 30th *November* next, and forthwith commence the work; and that defendant should thereupon pay him 250*l.* on 22d *October* next, 300*l.* on 15th *November* next, 250*l.* on the plans being deposited with the Board of Trade, and 300*l.* when it should have been adjudged that the standing orders of the House of Commons had been complied with. The count then averred that plaintiff forthwith commenced the work, and continued it until after the said 15th *November*, but defendant did not pay the 250*l.* on 22d *October*, nor the 300*l.* on 15th *November*.

Held, that a common count for work and materials might be added, without "apparent violation" of *R. G. Hil.* 4 *W.* 4. *General Rules and Regulations*, 5.

Assumpsit. The first count recited that a railway was intended to be constructed under an act of parliament, to be applied for, for which purpose it was necessary that a survey should be made (as explained); and, thereupon, to wit 21st *October* 1845, it was agreed, by and between plaintiff and defendant, that plaintiff should, by himself and workmen &c., survey a part, to wit eleven miles, of the country lying between &c., over which a part of the railway was intended to be made, to wit such eleven miles as were nearest to &c., and should

select and set out such part of the line as would pass over the said eleven &c., and prepare, in respect of the said last mentioned part, the sections and plans required to be deposited with the respective clerks of the peace of the respective counties and also with her Majesty's Board of Trade, in time for the same being deposited with such clerks of the peace in sufficient and proper time in that behalf, according to the orders of the Houses of Parliament, to wit on or before 30th *November* then next; and that plaintiff should forthwith enter upon and commence the work, to wit on 22d *October* 1845; and that defendant should thereupon pay to plaintiff 250*l.*, to wit on the said 22d *October*, and 300*l.* on 15th of *November*, in the year aforesaid, the further sum of 250*l.* on the plans and sections being deposited with the Board of Trade, and the further sum of 300*l.* when, according to the practice and usage of the House of Commons, it should have been duly adjudged and reported to the House that the standing orders of the House had been complied with. The count then averred mutual promises to perform the agreement; and that plaintiff, confiding &c., did, after the making of the agreement, to wit on 22d *October* 1845, enter upon and commence the work, and did, by himself &c., continue, carry on and perform the same from thenceforth until, and upon and after, the said 15th *November*, which day was past before the commencement of the suit; yet defendant did not nor would, on the said 22d *October*, pay plaintiff the said 250*l.*, so agreed to be paid to him on that day, or any part thereof; but then, and thence hitherto, wholly neglected &c.; and the said 250*l.* remains due and unpaid to plaintiff. And defendant, further disregarding &c. (similar breach

as to the 300*l.* to be paid on 15th *November*). By means &c., plaintiff hath not only been deprived of the 250*l.* and 300*l.*, but, having, for the necessary purposes of the work, hired and employed workmen and assistants, and sent them to the said part of the said country &c., was unable to pay them out of the moneys that ought to have been so paid to him, and was obliged to provide other moneys, and put to great trouble and expence, &c.

The second count stated that defendant was indebted to plaintiff in 1000*l.* for work done and materials for the same provided by plaintiff for defendant at his request; and for money paid by plaintiff for defendant at his request.

In the last vacation, *Erle* J., at chambers, made an order that the first or second of the two counts be struck out, with costs; "the same being for the same subject-matter of complaint, and in violation of the rules relating to pleading." *Peacock*, in this term, obtained a rule nisi to rescind that order.

Joseph Brown now shewed cause. Even before the new rules, it was not usual to insert a count on a special contract to pay for work at fixed times and to add besides a common count for work and labour, because all might have been proved under the common count. And, by *R. G. Hil.* 4 *W.* 4., *General Rules and Regulations*, 5. (*a*), "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each." The object of this clearly was to prevent a special and a common count

(*a*) 5 *B & Ad.* ii.

being both used for the same cause of action. This appears by the examples: a count for not giving a bill in payment for goods is not to be joined with a count for the price of the goods; nor a count for not accepting goods with one for goods bargained and sold; nor a count on a demise with one for use and occupation. It is no answer to this, that the plaintiff here demands in the first count the contract price and in the second the value of the work; for a like argument might be urged in the instances adduced; and the contract might be given in evidence under the second count. It may be said that, under the first count, the plaintiff insists only on the first two instalments, which would be due though no work had been done; note (4) to *Pordage* v. *Cole* (*a*); whereas under the second count it would be necessary to prove the work done. But this, in effect, is merely a variation in the form of a complaint substantially the same: and, besides, even under the special contract here it would be necessary to shew that the work was begun and in progress; and, accordingly, the special count contains averments to that effect, which are traversable.

Peacock, contrà. The question is, whether, according to the language of *R. G. Hil.* 4 *W.* 4., *General Rules and Regulations*, 6 (*b*), "more than one count" has "been used, in apparent violation of the preceding rule." That was the test applied by *Alderson* B. in *Cahoon* v. *Burford* (*c*), where a count for breach of warranty of a horse was allowed together with one for money had and received: and there the particulars stated that, on the

(*a*) 1 *Wms. Saund.* 320 *b*. See note (*b*), p. 320 *c*.

(*b*) 5 *B. & Ad.* iv.

(*c*) 13 *M. & W.* 136.

second count, the plaintiff sought to recover back the price of the horse; but *Alderson* B. said that they did not affect the question (*a*). [*Wightman* J. The case seems to be like that of a count on a policy of insurance and a count for money had and received to recover back the premium, which are allowable (*b*).] The first two instalments claimed in the special count would be due if the work were not done. In *Gilbert* v. *Hales* (*c*) counts by an indorsee of *Parisian* bills of exchange against the administratrix of an acceptor, together with other counts on the special law of *France*, respecting the same bills, and with others, respecting the same, on a special agreement to pay in consideration that the plaintiff would procure their discount, were all allowed.

Lord DENMAN C. J. We think you are entitled to make your rule absolute.

PATTESON J. The case most like this is that of a count for freight upon a charter party and a count for freight pro ratâ itineris upon a contract implied by law, which may be inserted together (*b*).

COLERIDGE J. The contract in the second count does not appear to be identical with that in the first.

WIGHTMAN J. concurred.

Rule absolute (*d*).

(*a*) In the present case, the particulars specified only work done and money expended in respect of the surveying &c. the railway; and they referred, as to part of the sum claimed, to the agreement, but, as to the other part, contained no such reference.

(*b*) *R. G. Hil.* 4 *W.* 4., *General Rules and Regulations*, 5.; 5 *B.* & *Ad.* iii.

(*c*) 2 *D.* & *L.* 227. (*d*) See *Matthewson* v. *Ray*, 16 *M.* & *W.* 329.

Sir RICHARD DOBSON, Knt., and JOHN SUTTON *against* BLACKMORE.

CASE. The first count of the declaration stated that, before and at the time of the committing &c., a messuage and premises, with the appurtenances, situate at *Greenwich*, in *Kent*, and adjoining to and abutting upon a navigable river, to wit the River *Thames*, were in the possession and occupation of a certain person, to wit one *Henry Richard Chappell*, as tenant thereof to plaintiffs, the reversion thereof then and still belonging to plaintiffs: that, before &c., and at all times, plaintiffs and all other the liege &c. were accustomed to have, and of right ought to have had, free passage and navigation in and upon the said river for their ships, vessels, barges, lighters and boats; and plaintiffs were also accustomed to have, and ought to have had, and of right to have, for the due occupation and enjoyment of the said messuage and premises, with the appurtenances, by their said tenant, and for the benefit

A count in case, stating that plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed and of right entitled to have free use and navigation of the river, for the purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river, but that defendant fixed barges, planks, &c., in the part of the river near the messuage, and kept and continued the same, and thereby hindered plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and plaintiff was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently shewing a particular injury to the individual.

But, if the jury negative actual damage, the plaintiff must have judgment.

A count stating plaintiff to be reversioner of premises, occupied by his tenants, and abutting on a public navigable river, and that plaintiff and all the liege &c. were accustomed of right to have free navigation and passage on the river for boats &c., and plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the same, and pass to the premises from the river, and unload the boats on the premises, without obstruction; but that defendant fixed barges, planks, &c. in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises from the river, and hindered the unloading of boats on the premises, and by means thereof plaintiff was injured in his reversionary interest, is bad in arrest of judgment, as not shewing a damage to the reversionary interest.

and advantage of the said messuage and premises, the full and free use and navigation of that part of the said river which is near to the said messuage and premises, and free and open passage for all persons, in boats, barges and other vessels, to approach and pass to the said messuage and premises from and out of the said river, and also to depart and pass from the said messuage and premises to and into the said river, and to load and unload their boats, barges and other vessels at and upon the said messuage and premises, without the hindrance or obstruction of any person or persons whatsoever: yet defendant, well knowing &c., but contriving &c. to injure and aggrieve plaintiffs in their said reversionary estate and interest of and in the said messuage and premises with the appurtenances, whilst the same were so in the possession and occupation of the said tenant as such tenant thereof to plaintiffs as aforesaid, and whilst the plaintiffs were so interested therein, to wit on 9th *April* 1842, and on divers other days &c., wrongfully &c., and without the leave &c. of plaintiffs, placed and fixed, in and upon the said river *Thames*, and in and upon that part thereof which is near to the said messuage and premises, divers barges, planks, rafters, timbers, chains, cables, irons, ropes and other materials, and wrongfully and unlawfully kept and continued the same so there placed and fixed, for a long space of time, to wit thence hitherto; and thereby during all that time defendant wrongfully and unlawfully hindered and obstructed the use and navigation of that part of the river which is near to the said messuage and premises as aforesaid, and hindered and prevented the passage of divers persons desirous of passing to the said messuage and premises from and out of the said

river, and to and into the said river from the said messuage and premises; and also thereby hindered and prevented the loading and unloading of divers boats &c., at and upon the said messuage and premises: and by means of the said several premises plaintiffs have been and are greatly injured and aggrieved in their said reversionary estate and interest of and in the said messuage and premises with the appurtenances, so in the possession and occupation of the said *H. R. C.*, as tenant thereof to the plaintiffs, as aforesaid.

The 2d, 3d, 4th, 5th and 6th counts were for similar injuries to the reversionary interest of the plaintiffs in other premises, in the occupation of other tenants respectively.

7th count. That, before and at the time of the committing the grievances next mentioned, plaintiffs were lawfully possessed of a certain other messuage and premises, with the appurtenances, situate at *Greenwich* aforesaid, in the county aforesaid, adjoining to and abutting upon the said river *Thames*, being such public navigable river as aforesaid; and by reason thereof plaintiffs, before and at the time of the committing &c., and at all times, were accustomed, and of right entitled, to have, and still of right ought to have, full and free use and navigation of the said river, for the purpose of passing and repassing thereon in boats, &c., and of conveying their servants, goods and merchandise to and from the said last mentioned messuage and premises, and also convenient access to the same messuage and premises from the said river, from time to time and at all times, for the necessary and beneficial occupation and enjoyment of the same. Nevertheless, defendant, well knowing &c., but contriving &c., here-

tofore, to wit on 9th *November* 1842, and on divers other &c., wrongfully &c., and without the leave &c., placed and fixed in and upon the said river *Thames*, and in and upon that part thereof which is near to the last mentioned messuage and premises, divers barges, planks, &c., and other materials, and wrongfully &c. kept and continued the same so there placed and fixed for a long space of time, to wit thence hitherto &c., and thereby, during all the time last aforesaid, defendant wrongfully and unlawfully hindered and prevented plaintiffs from having the full and free use and navigation of the said river, and from passing and repassing thereon to and from the said last mentioned messuage and premises in boats &c., and from conveying their servants, goods and merchandise, from time to time, to and from the said messuage and premises, and from occupying and enjoying the same in so convenient and beneficial a manner as they otherwise might and would have done: and by reason of the premises last aforesaid plaintiffs have been put to great trouble and expense in and about the conveyance of their servants, goods and merchandise, and in and about endeavouring to remove the said obstructions &c.

The 8th count was for similar injuries to plaintiffs in respect of their possession and occupation of other premises: averring, as damage, that thereby defendant, then and during all the time last aforesaid, hindered and prevented plaintiffs from having the full and free use and navigation of the said river for the purposes last aforesaid, and from conveying to and from their said several messuages and premises last mentioned, in their boats, barges and other vessels, divers of their servants and divers goods and merchandise, which were

then necessary for the due and convenient use and enjoyment of the same several messuages and premises respectively, and divers materials and other things which were then requisite for the due repair and maintenance of the same messuages and premises respectively: and, by reason thereof, plaintiffs were then not only greatly impeded and hindered in the due occupation and enjoyment of the same messuages and premises respectively, but were also forced and compelled to carry and convey their said servants and their said goods and merchandise, and their said materials, and other things, by land, and by another and longer and more circuitous and inconvenient route; and were also put to great trouble and expense, to wit &c., in and about the last mentioned carriage and conveyance, and in and about endeavouring to remove the obstructions so wrongfully &c.; and have been and are thereby otherwise greatly injured &c.

There was a 9th count, on which nothing turns.

Pleas: 1. Not guilty.

2. To the first count, denying the possession of the tenant alleged in the declaration.

3. To the same, denying that plaintiffs were accustomed to have, and ought to have had, the full and free use and navigation of that part of the said river which is near the said messuage, &c., and free and open passage for all persons &c., for the due occupation of the said messuage &c.; modo et formâ.

4, 5, 6, 7, 8. To the second, third, fourth, fifth and sixth counts, respectively, similar pleas to the third.

9. To the seventh count, denying the right of the plaintiffs to the navigation of the river for the beneficial occupation of the premises, modo et formâ.

10. To the eighth count, a plea denying the possession of the plaintiffs.

11. To the eighth count, a plea like the ninth.

Issues were joined on all these traverses.

There were also pleas to the ninth count: but on this count plaintiff entered a nolle prosequi.

On the trial, before Lord *Denman* C. J., at the *Surrey* Spring assizes, 1845, the defendant was proved to have taken a part in causing the obstruction, which consisted of a floating wharf, whereby access to the premises in question from the river was obstructed; and evidence was given of inconvenience occasioned thereby to the occupiers of the houses. It was objected, on behalf of the defendant, as to the counts on the reversionary interest, that no permanent obstruction, or other injury to the reversion, was shewn; and, as to the counts on the possessory interest, that the plaintiffs were not shewn to have been actually damaged. The Lord Chief Justice reserved leave to move to enter a verdict for the defendant, and directed the jury to find for the plaintiffs on the first six counts if they considered the erection to be a permanent injury, and on the seventh and eighth counts if they thought it proved that the plaintiffs were actually injured. The jury found for the plaintiffs on all the issues, with one shilling damages, saying, in answer to a question from his Lordship, that they thought no actual damage had been suffered by the plaintiffs in respect of their possessory interest, and that there was no evidence as to the amount of the injury complained of in the first six counts.

In *Easter* term, 1845, *Shee* Serjt. obtained a rule nisi to enter a verdict for the defendant, or for a new trial on the ground that the verdict was against the evidence,

or for an arrest of judgment, or for a venire de novo. In *Easter* term, 1846,

Channell Serjt. and *Badeley* shewed cause (*a*). The objection taken to the counts on the possessory interest is, that the damage sustained by the plaintiffs to that interest is sustained by them in common with all the public: that the injury therefore is in the nature of a public nuisance; and that, no damage of a special kind to themselves being shewn, the plaintiffs cannot recover. And this objection is taken both in the form of a motion to enter a verdict for the defendant and also in arrest of judgment. But in *Rose* v. *Groves* (*b*) it was held that an action on the case lay for a similar obstruction, particular damage to the plaintiff being proved; although that damage was in point of fact similar in its nature to that which all the public sustained thereby. Such damage is of a special kind, in the sense in which that word is used in *Chichester* v. *Lethbridge* (*c*), which is more properly termed "particular" damage. *Rose* v. *Groves* (*b*), as was observed by *Tindal* C. J. in his judgment in that case, is not to be distinguished from *Iveson* v. *Moore* (*d*), *Wilkes* v. *The Hungerford Canal Company* (*e*) and *Rose* v. *Miles* (*g*). And *Greasly* v. *Codling* (*h*) also shews that a "particular inconvenience" is ground for an action by one who is injured by a nuisance affecting the public, but who, by

(*a*) *April* 23d. Before Lord *Denman* C. J., *Patteson*, *Williams* and *Wightman* Js.

(*b*) 5 *M. & G.* 613.

(*c*) *Willes*, 71.

(*d*) 1 *Ld. Raym.* 486.; *S. C.* 1 *Salk.* 15.; *Holt*, 10.; *Carth.* 451.; 12 *Mod.* 262.; 1 *Com. Rep.* 58.; *Comb.* 480.; note (*a*) to *Chichester* v. *Lethbridge*, *Willes*, 74.

(*e*) 2 *New Ca.* 281.

(*g*) 4 *M. & S.* 101.

(*h*) 2 *Bing.* 263.

reason of his peculiar circumstances, suffers more by that nuisance. To the same effect is *Wiggins* v. *Boddington* (*a*).

The same reasoning to a great extent applies to the counts on the injury to the reversionary estate. In alleging such an injury in pleading, it is not necessary to aver in express terms that the injury was of a permanent character, though the injury set out and proved must be such an one as would affect the reversionary interest; 2 *Chit. Pl.* note (*n*) to p. 589. (7th ed.), *Young* v. *Spencer* (*b*). Whether it be such an injury or not must therefore in many cases become a question of evidence only. The first six counts here assert, and the evidence shewed, a continuous obstruction, kept up for many days; and such, moreover, as must always render the repairing the premises in question, and carrying materials for that purpose, a matter of greater time and expense. Many nuisances removable in their nature may nevertheless constitute an injury to the reversion; *Tucker* v. *Newman* (*c*), *Bedingfield* v. *Onslow* (*d*); although they might be abated before the estate came into possession; *Jesser* v. *Gifford* (*e*), *Shadwell* v. *Hutchinson* (*g*): and the reversioner has his remedy even though, on the whole, the benefit to the property was greater than the injury; *Alston* v. *Scales* (*h*).

It is contended that no damage was found in this case by the jury. But, where there is a breach of duty or an illegal act, the law will import damage as resulting from it, although no pecuniary loss, or none that is

(*a*) 3 *C. & P.* 544.
(*b*) 10 *B. & C.* 145.
(*c*) 11 *A. & E.* 40.
(*d*) 3 *Lev.* 209.
(*e*) 4 *Burr.* 2141.
(*g*) 3 *C. & P.* 615. 617.
(*h*) 9 *Bing.* 3.

appreciable, be proved; *Ashby* v. *White* (*a*), *Hobson* v. *Todd* (*b*), *Pindar* v. *Wadsworth* (*c*), *Barker* v. *Green* (*d*).

If, however, the counts for injury to the reversionary interest be bad, yet, the damages being nominal only, the Court will attribute them to the counts on the possessory interest; for the case of nominal damages forms an exception to the rule that damages generally entered must be held to apply to the whole declaration (*e*).

Shee Serjt., *Peacock* and *Pigott*, contrà. No authority which has been cited shews that an individual can recover in respect of a public nuisance, where his particular damage is identical with the injury to the public. A distinct damage to the individual was proved in *Wilkes* v. *Hungerford Market Company* (*g*), *Rose* v. *Groves* (*h*), *Rose* v. *Miles* (*i*), *Iveson* v. *Moore* (*k*) and *Chichester* v. *Lethbridge* (*l*).

As to the counts on the reversionary interest, no such damage to the reversion is shewn as will support this action. The public obstruction might, while it lasted, be an injury to the occupiers. But it was not permanent; no injury appears which, by any legal consequence, could affect the reversion: and, as a matter

(*a*) 2 *Ld. Raym.* 938. 955. (*b*) 4 *T. R.* 71.

(*c*) 2 *East*, 154.

(*d*) 2 *Bing.* 317. As to this case, see *Williams* v. *Mostyn*, 4 *M. & W.* 145. 154.

(*e*) The argument against the rule is reported by *H. Merivale*, Esq.

The argument in support of the rule was heard on *April* 27th, 1846, before Lord *Denman* C. J., *Williams* and *Coleridge* Js.

(*g*) 2 *New Ca.* 281. (*h*) 5 *M. & G.* 613.

(*i*) 4 *M. & S.* 101

(*k*) 1 *Ld. Raym.* 486.; *S. C.* 1 *Salk.* 15.; *Holt*, 10.; *Carth.* 451.; 12 *Mod.* 262.; 1 *Com. Rep.* 58.; *Comb.* 480.; note (*a*) to *Chichester* v. *Lethbridge*, *Willes*, 74.

(*l*) *Willes*, 71.

of fact, the jury considered that no actual injury to the plaintiff was proved. Even as to the immediate tenants, the case resembles *Fineux* v. *Hovenden* (*a*), where a majority of the Judges held that the obstruction of a public right of way was not a special injury for which an individual could sue. If, however, the immediate tenants could complain, that gives no right of action to the reversioner, unless he shew a permanent obstruction, or, as in *Jesser* v. *Gifford* (*b*), some actual injury to the reversion; *Baxter* v. *Taylor* (*c*) (explained in *Tucker* v. *Newman* (*d*)). That the obstruction might possibly continue after the expiration of the particular estate proves nothing; *Jackson* v. *Pesked* (*e*). The nuisance, as described in every count, might be abated by any person; 2 *Hawk. Pl. Cr.* 148. (ed. 7.) (*g*). [*Coleridge* J. May not I sue a man for erecting a permanent wharf across my frontage?] The party in actual occupation may so sue, if the erection be found to be injurious; *Fay* v. *Prentice* (*h*). It is true that Lord *Hale*, *De Port.* 85. (*i*), says that not every building below high water mark is ipso facto in law a nuisance. But in *Rex* v. *Ward* (*k*) the Court explain that, in that passage, he means only that there may be such erections which are not nuisances: here every count shews that the erection complained of is a public nuisance. The action would lie, if the erection, though not causing actual injury, prejudiced the right of the reversioner; *Ashby* v. *White* (*l*). But no prejudice to the right of the reversioner

(*a*) *Cro. Eliz.* 664.
(*b*) 4 *Burr.* 2141.
(*c*) 4 *B. & Ad.* 72.
(*d*) 11 *A. & E.* 40. 43.
(*e*) 1 *M. & S.* 234.
(*g*) B. I. ch. 75. s. 12.
(*h*) 1 *C. B.* 828.
(*i*) Part 2. Ch. 7.
(*k*) 4 *A. & E.* 384. 406.
(*l*) 2 *Ld. Raym.* 938. 955.

arises from an illegal obstruction during the particular estate. An action might indeed lie, if the reversion had been put up to sale, and brought a less price in consequence of the obstruction. But that something of this kind is necessary appears from *Hopwood* v. *Schofield* (*a*).

The counts on the possessory interest are bad on the principle, already established, that the nuisance is public, and particular damage is negatived. The mere debarring of an individual from using a public highway, and his delay thereby, "is not such a special damage for which an action on the case will lie;" *Paine* v. *Partrich* (*b*). To the same effect are *Co. Lit.* 56 *a.*, and *Hubert* v. *Groves* (*c*), which has not been overruled.

A further objection, on the record, to all the eight counts is that, if they allege any private right at all, they allege it as co-existent with a public one. Now the two cannot co-exist; *Chichester* v. *Lethbridge* (*d*). The seventh count actually states the public right, and then, "by reason thereof," a right of the plaintiffs to access to their own premises. This is the ordinary way of alleging a private right; note (2) to *Mellor* v. *Spateman* (*e*), 2 *Chitt. Pl.* 617. (7th ed.) and note (*z*) there. On the same ground, the verdict must be entered for the defendant on the traverses of the private right.

Even if the possessory counts be good, the judgment must be arrested, or a venire de novo awarded, for the badness of the others; or the verdict must be entered for the defendant on the seventh and eighth counts, and judgment on the others be arrested. The jury found

(*a*) 2 *Moo. & R.* 34.
(*b*) *Carth.* 191. 194.
(*c*) 1 *Esp. N. P. C.* 148.
(*d*) *Willes*, 71.
(*e*) 1 *Wms. Saund.* 346.

no damages in respect of the possession of the plaintiffs; the nominal damages are therefore confined to the counts on the reversion; and, as to these, the verdict can be supported only on the supposition that the erection, without actual damage, is by necessary intendment of law an injury to the reversion. On the other hand, if the damages are taken to be assessed generally on all the counts, and some are bad, there must be a venire de novo; *Leach* v. *Thomas* (*a*), *Empson* v. *Griffin* (*b*).

Cur. adv. vult.

Lord DENMAN C. J., in this term (*January* 26th), delivered the judgment of the Court.

A rule was obtained for arresting the judgment in this case, on objections taken to eight counts. All of them complained of injury to the plaintiffs from the unlawful stopping up of a public river: the first six alleging that his reversionary estate in six different houses, occupied by as many several tenants, had sustained damage therefrom, two that the like damage had been done to houses of which he was possessed. On a ninth count a nolle prosequi was entered.

The objection to those counts in which the plaintiffs declared in respect of their own possession was, that the unlawful act of stopping a road is a nuisance to all the Queen's subjects, and not the ground of action at the suit of an individual. But this objection, in its general form, was considered in the case of *Chichester* v. *Lethbridge* (*c*) and overruled, when a plaintiff sustains any special damage from the unlawful obstruction. *Iveson* v.

(*a*) 2 *M. & W.* 427.
(*b*) 11 *A. & E.* 186.
(*c*) *Willes*, 71.

Moore (*a*), in Lord *Raymond* and other reporters of that period, cited in a note at the end of that case, is precisely in point. So is the case of *Rose* v. *Groves* (*b*), which explains that special damage here means damage brought on the individual complaining, which might be perhaps more properly styled particular damage, or "a special damage more than the rest of" her Majesty's "subjects (*c*)," and not that sort of damage only which may or may not ensue from the act done, but entitles the plaintiff, when it does occur, to specific reparation in the form of damages.

The objection to the six counts was, that the unlawful act charged does not, *per se*, import any damage to the plaintiffs' reversionary interest. The tenant in possession is abridged of his rights by the stoppage of a public road, and may suffer damage from it. But the landlord, who is out of possession, is in nowise damnified by his tenant's being prevented from enjoying his house in so ample a manner as he might otherwise have done. Each of the counts in question would be established by evidence proving that the defendant had, on two different days, placed a bar across the road for five minutes only. In *Baxter* v. *Taylor* (*d*) a greater obstruction was held to give a reversioner no cause of action. Even a more permanent nuisance may not continue till the end of the lease, when the plaintiff's right of possession would accrue, but might in the meantime be abated by one of the public, or by the sheriff on indictment. These counts do not even aver

(*a*) 1 *Ld. Raym.* 486.; *S. C.* 1 *Salk.* 15.; *Holt*, 10.; *Carth.* 451.; 12 *Mod.* 262.; 1 *Com. Rep.* 58.; *Comb.* 480.; note (*a*) to *Chichester* v. *Lethbridge*, *Willes*, 74.

(*b*) 5 *M. & G.* 613.

(*c*) *Willes*, 74, note (*a*).

(*d*) 4 *B. & Ad.* 72.

(as in *Rose* v. *Groves* (*a*)) that the obstruction was continued to the time of bringing the action (*b*). If, indeed, an obstruction of a public road appeared to be of a permanent nature in its construction, or professed, either by notice affixed or in any other way, to deny the public right, and so led to an opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which we will not say that an action would not lie. But this is a peculiar state of things, which ought to be distinctly set forth, and by no means arises from the naked fact that, while the plaintiff's house was in the hands of his tenant, a public road had been obstructed by the defendant.

Some of these counts being good and some bad, the damages might properly have been severed, and judgment entered for the plaintiffs on the good counts, and arrested on the others. But, on referring to my note, I find that, in answer to my question on the subject, the jury declared that the plaintiffs had in fact sustained no damage whatever; and a verdict was taken for 1*s.* on the whole declaration. We have, therefore, no power to enter the verdict on any particular counts, but are placed under necessity of arresting the judgment generally.

Judgment arrested.

(*a*) 5 *M.* & *G.* 613.

(*b*) See, as to this, the allegation of the keeping and continuing, in the first count, p. 992.

SMITH *against* HOPPER and Others.

TRESPASS against *John Hopper*, five others, and *John Cox*. The declaration charged that defendants with force and arms broke and entered divers closes of plaintiff, in the parish of *Bishop Wearmouth*, county of *Durham*, and broke open two gates of plaintiff &c., and trod down the grass &c.

Pleas. 1. Not guilty (by statute). Issue thereon. 2. That there was in the locus in quo a public footway, which was obstructed by the gates; justification, in use of the footway and for removing the obstruction. The replication traversed the existence of the footway; on which traverse issue was joined.

On the trial, before *Cresswell* J., at the *Durham* Summer assizes, 1845, it appeared that the plaintiff was tenant of the land in question to a Mrs. *Reed;* that the defendant *Cox* was the assistant surveyor of the parish of *Bishop Wearmouth* under a Highway Board, formed in pursuance of the Highway Act, 5 & 6 *W.* 4. *c.* 50. *s.* 18.; and that the other six defendants were members of the Board and inhabitants of the parish. On 15th *July* 1844, at a special meeting of the Board, at which these six defendants were present, the following resolution was adopted.

"Memorandum. The inhabitants of the township of *Bishop Wearmouth*, in vestry assembled, having resolved that such portion of the highway rate as might be re-

Where a clause in a statute provides that no action shall be commenced against any person for any thing done in pursuance of or under the authority of the act until certain notice has been given, nor after sufficient satisfaction or tender of satisfaction, those persons are within the protection of the clause who, although their act be not legally justifiable under the statute, act in a bonâ fide belief that they are executing some particular provision of the statute, provided such belief be not utterly unreasonable.

As under sect. 109 of the Highway Act, 5 & 6 *W.* 4. *c.* 50., where a Board, formed under sect. 18, with the assistant surveyor, broke down a gate, without any previous application to justices, in assertion of a supposed public footway, which turned out not to exist.

quisite should be applied to the prosecution or defence of any action which might arise out of any proceedings the Highway Board might consider necessary to adopt for restoring to the public its ancient right of way past *Thornhill*, and having instructed the Highway Board to direct their surveyor forthwith to open out this road to the public: Resolved, That it is the duty of this Board to obey the instructions of their constituents (the rate-payers), who contribute the necessary funds. It is therefore ordered that the assistant surveyor of the Board be, and he is hereby, directed to open out the road through *Thornhill* past *Broad Meadows* to the public: Resolved, That the clerk communicate the above resolution to Mrs. *Reed*, and request to be placed in communication with her solicitor on the subject. Unless a suitable arrangement for opening the road forthwith, It is ordered, That the surveyor open the same on *Wednesday* next, and remove all obstructions there may be to the enjoyment of the road to the public."

In pursuance of this order, no arrangement having been made with Mrs. *Reed*, the defendant *Cox* broke down a gate, for the purpose of opening the alleged road, and passed over the ground in question, being in the occupation of the plaintiff; which were the trespasses complained of. The defendants did not prove, to the satisfaction of the jury, that there was a public highway: but it was insisted, on their behalf, that they were entitled to twenty one days' notice of action, under stat. 5 & 6 *W.* 4. *c.* 50. *s.* 109. (*a*), which had not been

(*a*) Which enacts: "That no action or suit shall be commenced against any person for any thing done in pursuance of or under the authority of this act until twenty one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is

given. The learned Judge reserved leave to move to enter a verdict for the defendants on this point: and a verdict was taken for the plaintiff on both issues.

In *Michaelmas* Term, 1845, *Watson* obtained a rule nisi for entering a verdict for the defendants on the first issue. In last term (*a*),

Knowles, *F. Robinson* and *J. C. Heath* shewed cause. The defendants were not within the protection of sect. 109 of stat. 5 & 6 *W.* 4. *c.* 50., the trespasses not being "any thing done in pursuance of or under the authority of this act." It is not enough that a party should suppose himself entitled to do the thing under the act: there must be, besides bona fides, a reasonable ground for the supposition, though it is not necessary that the supposition should be legally true. Here no such reasonable ground could exist. The board is formed under sect. 18, which gives it the powers of the vestry and the surveyor. The sections relied upon, as conferring the powers to do the act now in question, are 65, 67 and 72. Now sect. 65 authorizes only the

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intended to be brought, nor after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after three calendar months next after the fact committed for which such action or suit shall be so brought;" "and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before twenty one days' notice thereof given as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited," "then the jury shall find a verdict for the defendant therein."

(*a*) *December* 4th, 1846. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

pruning &c. of hedges and trees which prejudice the highway, and that under the order of justices. Sect. 67 authorizes cleansing ditches, laying bridges, and similar works. Sect. 72 imposes penalties for obstructing the passage of a footway or highway, and for other nuisances thereto. Could it be supposed that any of these sections warranted a surveyor in breaking down a gate in assertion of a disputed highway, without order of a justice? The surveyor's duty, under sect. 6, is to "repair and keep in repair the several highways." [*Patteson* J. referred to sect. 69.] That relates only to carriageways and cartways. If a highway be out of repair, a mode of proceeding is given by the 94th and following sections, which the defendants have not adopted. Thus there is, not only no ground for inferring a reasonable belief, but strong proof to the contrary. The question whether the facts proved were reasonable ground for the belief is for the Court, not for a jury; *Panton* v. *Williams* (*a*). [*Watson*, for the defendants. That will be admitted.] The authorities appear at first sight not quite consistent: but the decisions may be divided into two classes; comprehending, first, those where a bonâ fide belief has been held enough; secondly, those where a reasonable belief has been held to be requisite. The decisions of the former class may, for the most part, be explained; and those of the second class present a view which is always consistent with good sense. A bonâ fide belief is simply a belief: a malâ fide belief could not exist. A large class of cases, where magistrates or constables have received the protection of stat. 24 *G.* 2. *c.* 44. *ss.* 1, 6, 8. (or other

(*a*) 2 *Q. B.* 169.

statutes conferring protection on parties filling a specified office), because they acted on a bonâ fide belief, rest on a distinct ground. Such are *Briggs* v. *Evelyn* (*a*), *Weller* v. *Toke* (*b*), *Theobald* v. *Crichmore* (*c*), *Wedge* v. *Berkeley* (*d*), *Ballinger* v. *Ferris* (*e*), *Prestidge* v. *Woodman* (*g*). There the character gives the jurisdiction; and it is enough that there should be no malice. The case of an excise officer is similar; *Greenway* v. *Hurd* (*h*). The principle by which these cases are distinguished is illustrated by *Hughes* v. *Buckland* (*i*). They would be applicable here if the protection of sect. 109 of stat. 5 & 6 *W.* 4. *c.* 50. had been given specifically to parties filling a particular character, as surveyors, or members of the Board: but it is given generally. In this class of cases, the bonâ fide belief is no protection unless the party fill the office in fact. Again, bonâ fide belief is all that need be proved where the supposed authority is given by a statute difficult to construe, which has not been technically adhered to; there it cannot be said that the belief is unreasonable. To this class belong *Pratt* v. *Hillman* (*k*) and *Wells* v. *Ody* (*l*), cases under the Building Act, 14 *G.* 3. *c.* 78.; *Waterhouse* v. *Keen* (*m*), a case of toll under a Turnpike Act; *Beechey* v. *Sides* (*n*) and *Reed* v. *Cowmeadow* (*o*), under the Malicious Mischief Act, 7 & 8 *G.* 4. *c.* 30.; *Jones* v. *Gooday* (*p*), under

(*a*) 2 *H. Bl.* 114. (*b*) 9 *East*, 364.
(*c*) 1 *B. & Ald.* 227. (*d*) 6 *A. & E.* 663.
(*e*) 1 *M. & W.* 628.; *S. C. Tyrwh. & G.* 920.
(*g*) 1 *B. & C.* 12. (*h*) 4 *T. R.* 553.
(*i*) 15 *M. & W.* 346. See *Braham* v. *Watkins*, 16 *M. & W.* 77.
(*k*) 4 *B. & C.* 269.
(*l*) 2 *C. M. & R.* 128.; *S. C.* 5 *Tyrwh.* 725.
(*m*) 4 *B. & C.* 200. (*n*) 9 *B. & C.* 806.
(*o*) 6 *A. & E.* 661. (*p*) 9 *M. & W.* 736.

a Paving Act. In other cases, parties have been held entitled to the protection where, besides the actual belief, there was a fair colour for it; as in *Rudd* v. *Scott* (*a*). On the other hand, where no such colour has appeared, the belief has been held insufficient; *Cook* v. *Leonard* (*b*), *Cann* v. *Clipperton* (*c*), *Lidster* v. *Borrow* (*d*), *Hopkins* v. *Crowe* (*e*), *Bush* v. *Green* (*g*), *The Company of Proprietors of the Witham Navigation* v. *Padley* (*h*), *Eliot* v. *Allen* (*i*), *Bartholomew* v. *Carter* (*k*), *Shatwell* v. *Hall* (*l*). *Carpue* v. *London and Brighton Railway Company* (*m*) is also an authority on the question what shall be deemed a thing done in pursuance of a statute. If, in the present case, a bonâ fide belief would cause the thing to have been done "under or by virtue of this act," it would, under sect. 109, entitle the defendants to a verdict, with or without notice. [*Coleridge* J. Surely there are many cases in which bona fides has been held to satisfy such a clause as this, though the clause also directed a verdict for the defendant where the thing should be done under the authority of the act.] That was so in some of the cases, as in *Pratt* v. *Hillman* (*n*) and *Waterhouse* v. *Keen* (*o*); in many others there was no such direction; and it does not appear that this consequence has been pointed out in argument. [*Coleridge* J. It was much insisted upon in *Stamp* v. *Sweetland* (*p*): but the decision there was on

(*a*) 2 *Scott, N. R.* 631.
(*b*) 6 *B. & C.* 351.
(*c*) 10 *A. & E.* 582.
(*d*) 9 *A. & E.* 654.
(*e*) 4 *A. & E.* 774.
(*g*) 4 *New Ca.* 41.
(*h*) 4 *B. & Ad.* 69.
(*i*) 1 *C. B.* 18.
(*k*) 4 *M. & G.* 612.
(*l*) 10 *M. & W.* 523.
(*m*) 5 *Q. B.* 747.
(*n*) 4 *B. & C.* 269. See stat. 14 *G.* 3. *c.* 78. *s.* 100.
(*o*) 4 *B. & C.* 200. See p. 203.
(*p*) 8 *Q. B.* 13.

another point.] It must be admitted that, if the words "in pursuance" &c. have not a different meaning when applied to the provision as to notice in the beginning of sect. 109, and that as to a verdict if the thing shall appear to have been done &c., the former provision becomes superfluous: yet it is difficult to say that the same words occurring in the same clause are to have two interpretations.

Watson, *Granger* and *Atherton*, contrà. As the bona fides is not disputed, it is for the plaintiff to negative reasonableness. Now the general purport of the act might well lead the Board to believe that they were acting at least in analogy to the powers expressly conferred on them. Under sect. 69 the surveyor is to abate encroachments. [*Wightman* J. The party encroaching is to be fined, and the surveyor to cause the encroachment to be taken down; and the justices may direct the expense to be levied by distress, as in the case of forfeitures under the act.] The clause may not strictly justify what has been done; but the question is as to absence of all colour for it. A similar argument arises on sect. 73. Again, the plaintiff, supposing the highway to have existed, was liable to a penalty for placing the gate, under sect. 72: here the Board have merely done directly what (if they had been right in their belief as to the facts) they might have done indirectly by enforcing the penalty. Indeed, the surveyor having, under sect. 18, the general superintendence of the highways, it may be questioned, whether he cannot in his discretion remove some obstructions, as, for instance, if a gate were placed across a street. [*Wightman* J. That would be under the former

law, not under the authority of the act.] *Jones* v. *Gooday* (*a*) is a case very closely resembling the present. The defendant there, imagining that he was authorized to do an act under a paving statute with a protecting clause, had exceeded his power; but the Court held him entitled to notice: and Lord *Abinger* said that, even if the thing done were unauthorized, "nevertheless, if there were a case where the commissioners, acting bonâ fide on a doubt as to the meaning of the words of the act of parliament, did such an act, I am far from supposing that they might not have a defence under this clause:" and *Parke* B., who laid down a similar principle, objected to a strict application of the doctrine in *Cook* v. *Leonard* (*b*). In *Ballinger* v. *Ferris* (*c*) the constable was taken to have acted illegally; but he was held entitled to notice because he acted in pursuance of an authority supposed to be given by act of parliament. In *Beechey* v. *Sides* (*d*) Lord *Tenterden* said: "It has uniformly been held, that where a party bonâ fide believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause." A safe doctrine seems to be laid down by *Williams* J. in *Cann* v. *Clipperton* (*e*): "It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursu-

(*a*) 9 *M. & W.* 736.

(*b*) 6 *B. & C.* 351. *Watson* referred also to a case (not reported) decided by the Court of Exchequer in *Trinity* term, 1845, where that Court held that an officer of the Metropolitan Police, who had entered a house to search for stolen goods without the warrant of a justice, was nevertheless protected by sect. 41 of stat. 10 *G.* 4. *c.* 44., having acted bonâ fide.

(*c*) 1 *M. & W.* 628.; *S. C. Tyrwh. & G.* 920.

(*d*) 9 *B. & C.* 806. 809.

(*e*) 10 *A. & E.* 582. 589.

ance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute." In *Rudd* v. *Scott* (*a*) it was attempted to shew that the defendant had so entirely misconstrued the act as to be without the protection of such a clause: but the Court held that it was rightly left to the jury whether he bonâ fide intended to act in pursuance of the statute. *Lidster* v. *Borrow* (*b*) is inapplicable: the party there acted as a volunteer, without colour of right; he merely fancied that he filled the character of gamekeeper. In *The Company of the Proprietors of the Witham Navigation* v. *Padley* (*c*) the question was whether, under the statutable general issue, the defendants could justify what they had done; for that, it was necessary that they should have followed the act strictly. The difficulty suggested as arising on the comparison of the two clauses, in sect. 109, as to notice and as to the verdict, does not exist. The notice is required when the thing is done "in pursuance of or *under the authority* of this act;" the defendant is to have a verdict if the thing "appears to have been done under or *by virtue* of this act." The former words apply to a fair belief on the part of the person acting: the latter require a compliance with the act.

Cur. adv. vult.

(*a*) 2 *Scott's New R.* 631.

(*b*) 9 *A. & E.* 654.

(*c*) 4 *B. & Ad.* 69.

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SMITH v. HOPPER.

Lord DENMAN C. J., in this term (*January* 14th), delivered the judgment of the Court.

This was an action of trespass for breaking the plaintiff's gate, for which he recovered a verdict and considerable damages. The defendants claimed a nonsuit, because no notice of action had been given, though the trespass was committed (as they contended) *in pursuance* of the late Highway Act, though not strictly justifiable under its provisions.

The case was rendered quite peculiar from an admission on all hands, at the trial, that the defendants acted bonâ fide in committing the trespass. But several decisions have established that bona fides is not alone sufficient to bring a case within the privileges of such an act of parliament, which ought not to be accorded to a proceeding which the Court deems utterly unreasonable and absurd. And some of the cases have said (properly in our opinion) that it is not enough for the defendant to have thought generally that he possesses the power to do what was done; he must also think that it was done in execution of some particular provision of the statute which applies.

We are of opinion that in this case the defendants might believe that they were acting in execution of the power to remove obstructions in public roads, without coming to a very irrational conclusion. The argument against it is indeed founded on a specific clause which prescribes a different course of proceeding to this end: but we are not prepared to say that officers of this description are bound to argue on a comparison of various clauses in a long act, and to decide correctly. We think that clauses which confer this privilege ought to receive a liberal construction, because officers de-

serve the protection of a fair notice of the ground of complaint when they act bonâ fide: compensation may then be obtained without further litigation: and there is no substantial inconvenience in requiring the party aggrieved to give such notice: on the contrary, he may be greatly benefited by the result just alluded to.

Rule absolute.

CUTTS *against* SURRIDGE, FITCH and DUNN.

A Judge has power to set aside a frivolous demurrer to a plea.

Declaration in case, against *F.*, *S.* and *C.*, charged that defendant *F.* was retained, by the executor of *E.*, to sell by auction the goods which were of *E.*; that defendants had caused to be published certain advertisements announcing the auction, and announcing that a certain quantity of choice wines would be sold thereat, and that they had been the property of *E.*; that defendants, knowing the premises, conspired to bring to the place of sale at the time of the sale wines of inferior quality which had not belonged to *E.*, and falsely to represent to plaintiff and others attending the sale that these wines were valuable and had been the property of *E.*, and were sold by order of his executor, and thereby to induce plaintiff and others to purchase them, and thereby to deceive and defraud the purchasers. That defendants did so bring &c., and did so falsely represent &c.; whereupon plaintiff, at request of *F.*, purchased a quantity of such wines, which were worthless, and had not belonged to *E.*, as defendants knew.

The three defendants pleaded separately. *S.* pleaded that he, *S.*, had not caused the advertisements to be published modo et formâ; and *D.* pleaded that he, *D.*, had not. Plaintiff demurred to these pleas, on the ground that the traverses were immaterial (*a*). A Judge, on summons, ordered the demurrers to be set aside as frivolous, or that the allegations in the declaration which the pleas traversed should be struck out.

This Court, in banc, held the order to be right.

Although *S.* and *D.*, before obtaining the summons, had obtained time to join in demurrer.

And although *F.*, to whose plea (setting up a different defence) plaintiff demurred also, had joined in demurrer.

CASE. The declaration charged that, whereas, before and at the time of the making of the conspiracy, confederacy, combination and agreement, and of the committing &c., hereinafter mentioned, defendant *Frederick Charles Fitch* exercised and carried on the trade and business of an auctioneer, and, as such auctioneer, had been and was retained and employed to sell and

(*a*) The abstract is confined to the ground of demurrer noticed by the Court.

dispose of by public auction, by the order of the executor of one *Ellys Anderson Stephens*, deceased, divers goods, chattels and effects, which were of the said *E. A. S.*, at certain premises called *Bower Hall*, situate &c.; and whereas defendants, before and at the time of the making of the conspiracy, &c., and before the committing &c., as hereinafter mentioned, had caused and procured to be printed, and published and publicly circulated, divers advertisements, announcements and publications, advertising, announcing and publishing the said intended sale by auction, and that the same would take place upon the said premises on the 31st *March* 1845, and on the five following days, at ten o'clock each day; and that the sale would be made by the said *F. C. F.*; and by divers, to wit ten thousand, of the said advertisements, announcements &c., the defendants advertised, and announced and published, that there would be sold at the said auction about two hundred dozen of wines, and that the sale was by order of the executor of *E. A. S.*; and by divers, to wit ten thousand, other of the said advertisements, &c., defendants announced and published that there would be sold at the said auction two hundred dozen of choice old wine, in port, sherry and madeira, and that the same had been part of the valuable property belonging to the said *E. A. S.*: Yet defendants, well knowing the premises, but contriving &c. to injure, deceive and defraud plaintiff, heretofore, to wit on &c., wickedly and maliciously did, amongst themselves, conspire, combine, confederate and agree together deceitfully to bring and place in and upon the said premises, before and at the time of the said intended sale, divers large quantities of wines of inferior and bad quality, and wines that

had never belonged to *E. A. S.*, and falsely, fraudulently and deceitfully to represent and pretend, to plaintiff and others attending the said sale, that the same were valuable wines, and that the same had belonged to *E. A. S.*, and were sold by order of his executor, and thereby to induce and persuade plaintiff and others attending at the sale to bid for and purchase the same, and thereby to deceive and defraud the purchasers thereof: That defendants, in pursuance of and according to the said conspiracy, &c., and in order to carry the same into effect, did, to wit on &c., bring and place in and upon the said premises, before and at the time of the said intended sale, divers large quantities, to wit two hundred dozen, of wines of inferior and bad quality, and which had not nor had any part thereof ever belonged to *E. A. S.*; and, at the said sale by auction, which took place (to wit) on &c., defendants, in further pursuance of the said confederacy &c., and in order to carry the same into effect, did falsely, fraudulently and deceitfully represent and pretend to the plaintiff and other persons attending the sale, at the sale, that the said wines were valuable wines, and had belonged to *E. A. S.*: whereupon plaintiff, confiding in the said representations and pretences, and believing that the same were true, at the request of defendant *F. C. F.*, as such auctioneer as aforesaid, at the said sale, to wit on &c., did bid for, and became and was the purchaser of, and the said *F. C. F.* then, as such auctioneer, sold to him, divers, to wit fifty five dozen bottles full of sherry wine, twelve dozen bottles full of port wine, and four dozen and eleven bottles full of madeira wine, in divers, to wit thirty four, lots, at and for various prices, amounting in the whole (to

wit) to 131*l.* 12*s.* 11*d.*: and defendants, by their falsely, fraudulently and deceitfully representing and pretending to plaintiff that the said wines were valuable wines, and that they had belonged to *E. A. S.*, then induced plaintiff to buy, and he then by reason thereof did buy, of defendant *F. C. F.* as such auctioneer as aforesaid the said bottles containing the said wines, in the said lots, at and for the said prices, amounting, to wit, to 131*l.* 12*s.* 11*d.*: and plaintiff afterwards, to wit on &c., paid to *F. C. F.* the said sum of 131*l.* 12*s.* 11*d.*: Whereas, in truth and in fact, the said wines in the said bottles so bid for by plaintiff, and so purchased by and sold to him as aforesaid, were not, nor were any or either of them, valuable wines, but the same were worthless and bad wines, and the same had not, nor had any or either of them, or any part thereof, ever belonged to *E. A. S.*; as defendants, at the time of their making the said false and fraudulent representations and pretences, and during all the time aforesaid, well knew.

This declaration was delivered to the three defendants on 31st *October* 1846. Each of them obtained time to plead, on terms of pleading issuably: and, on 21st *November*, each pleaded separately.

Fitch pleaded: First, Not guilty; Secondly, as to the bottles full of sherry and the bottles full of port, that he had brought assumpsit in C. B., against plaintiff for goods bargained and sold, which were the said bottles; and plaintiff had pleaded, amongst other pleas, fraud of *Fitch* and others; and *Fitch* had replied De injuriâ; that, on the trial of the issue, plaintiff had produced evidence of the grievances now complained of; but the issue had been found for the now defendant, who had recovered judgment; wherefore he prayed if plaintiff

should be admitted against the record to complain &c. The plaintiff joined issue on the first plea, and demurred specially to the second.

Surridge pleaded: First, Not guilty; Secondly, that he did not cause or procure to be printed and published, and publicly circulated, the said advertisements, announcements and publications in the declaration mentioned, or any of them, or any part thereof, in manner &c.; Thirdly, that he did not, by any of the said advertisements, announcements or publications in the declaration mentioned, advertise, announce or publish that there would be sold at the said auction about two hundred dozen of wines, and that the sale was by order of the executor of *E. A. S.*, in manner &c.; Fourthly, that he did not, by any of the said advertisements &c. in the declaration mentioned, advertise, &c., that there would be sold at the said auction two hundred dozen of choice old wine in port, sherry and madeira, and that the same had been part of the valuable property belonging to the said *E. A. S.*, in manner &c. All four pleas concluded to the country. The plaintiff joined issue on the first, and demurred specially to the other three. The grounds of demurrer to the second were that it did not sufficiently confess and avoid or traverse and deny; that, if material, it was an argumentative plea of Not guilty; that it put in issue immaterial matter; that, though it denied that defendant *Surridge* caused or procured to be printed &c., it did not deny that the other defendants, or either of them, printed &c., nor that they were printed &c. at all; and for that it traversed the printing, publishing and circulating in the conjunctive and not in the disjunctive. Similar grounds were assigned for the demurrers to the third and fourth pleas, mutatis mutandis.

Dunn pleaded: First, Not guilty; Secondly, that *Fitch* was not retained or employed to sell or dispose of by public auction, by order of the executor of *E. A. S.*, the said goods &c. which were of *E. A. S.*, in manner &c.; Thirdly, Fourthly and Fifthly, pleas containing denials as to himself corresponding with those in the second, third and fourth pleas of *Surridge*. All the pleas concluded to the country. The plaintiff joined issue on the first and second pleas, and demurred specially to the other three, on the same grounds as those assigned in the demurrers to *Surridge*'s pleas.

The marginal statements to each demurrer referred to the grounds assigned in the body of it.

These replications were all delivered on 7th *December*. Time to rejoin was obtained by all the defendants twice, namely on 11th and 17th *December*. On 22d *December*, the defendant *Fitch* joined in demurrer: but each of the other two defendants, *Surridge* and *Dunn*, took out a summons, which was heard before *Erle* J. on 24th *December*; and he, in compliance with the same, made two orders, that the demurrers to the pleas of the respective defendants last mentioned "be set aside as frivolous, or that the allegations in the declaration of which those pleas are traverses be struck out, as being immaterial and surplusage, to entrap the defendant." In this term (*a*),

Willes moved to set aside the two orders of *Erle* J. First, it has been doubted whether the power of setting aside demurrers as frivolous applies to demurrers by

(*a*) *January* 13th. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Erle* Js.

plaintiffs. The power was given for the purpose of preventing unnecessary delay by defendants. By *R. G. Hil.* 4 *W.* 4. 2. (*a*), the frivolous demurrer is to be set aside, and leave given to sign judgment, "as for want of a plea."

Secondly, the application is too late. The rule only provides that the demurrer shall be "set aside as irregular." Now the irregularity has been waived, these defendants having obtained time to rejoin, and another defendant having actually rejoined. If a non-issuable plea be pleaded when the defendant is under terms to plead issuably, the plaintiff cannot sign judgment after obtaining time to reply, because that is considered as an admission that he ought to reply; *Trott* v. *Smith* (*b*), *Stead* v. *Carey* (*c*). [Lord *Denman* C. J. When a demurrer is set aside as frivolous, that is not necessarily for irregularity. The Court does it (at the suggestion of the parties, it is true) in order that there may not be nonsense on its records.] It has been sometimes said that the practice of setting aside demurrers originated in the *R. G. Hil.* 4 *W.* 4. 2. (*a*), requiring a statement of the matter of law in the margin. [Lord *Denman* C. J. No. If there be no statement, or a frivolous one, the demurrer may be set aside, though good; but frivolous demurrers were set aside before that rule.] As to the other branch of the learned Judge's orders, for striking out the allegations in the declaration as immaterial, the power does not depend on the New Rules: and the practice is that this cannot be done after plea pleaded, or time obtained for pleading; 1 *Chitt.*

(*a*) 5 *B. & Ad.* xiv. (*b*) 9 *M. & W.* 765.
(*c*) 7 *M. & G.* 646.

Archb. Pr. 197 (8th ed.). Besides, the defendant *Fitch* having joined in demurrer, how can the declaration be amended as between the plaintiff and the other two defendants?

Thirdly, the demurrers are valid. It is immaterial whether the particular defendant pleading had caused the advertisements to be published and circulated modo et formâ. The gist of the action is the conspiracy. It does not signify who published the advertisements, if the defendants used them as part of the fraud. Not guilty would cover all the suggested defence. [*Erle* J. The defendants say, either your averments are material and must be traversed, or they are immaterial and must be struck out.] The answer is, that if the traverses are material the defendants will have judgment on the demurrer, if they are immaterial the defendants do not require them, because immaterial matter not traversed is not admitted; *Bennion* v. *Davison* (*a*). Besides, the pleas demurred to are bad as traversing several matters conjunctively instead of disjunctively.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*January* 25th), delivered the judgment of the Court.

This was an application to discharge an order of my brother *Erle*, for setting aside as frivolous the plaintiff's demurrers to three of the defendants' pleas, or striking out of the declaration the averments denied by those pleas.

The first ground, that the plaintiff is not within the rule under which demurrers may be set aside as frivolous,

(*a*) 3 *M. & W.* 179.

we think wholly untenable. The argument is drawn from the word "plea," employed in that rule. But we are of opinion that *plea* here means *pleading*, and applies to any pleading by either party.

Secondly, a frivolous demurrer was said to be of the nature of an irregularity, and to have been waived in this case by the defendants asking for time to join in demurrer. We think that it is not an irregularity, but an improper proceeding, which the Court in its discretion may set aside at any time. And we think the delay here affords no reason for the Judge refusing this application, even if we can review his decision in this respect.

We fully concur in opinion with the learned Judge, that the order ought to be made. The pleas possibly tender immaterial issues: but, if so, the plaintiff, by introducing into his declaration the averments which they negative, is alone to blame. The defendant is not bound to place himself under the disadvantage of appearing to admit their truth by passing them over without contradiction. And, if they are immaterial, the plaintiff cannot suffer by withdrawing them from the record.

Rule discharged, with costs.

WEARING *against* SMITH.

Under stat. 5 & 6 *Vict. c.* 122. *s.* 42. this Court in banc has no jurisdiction to discharge a prisoner who has become bankrupt and is in execution under a judgment obtained before the confirmation of his certificate, the jurisdiction being given to a single Judge. But if a Judge has, on hearing, refused to discharge, this Court may be moved to rescind his order.

On such application to a Judge, he may receive, and decide upon affidavit, the objection that the certificate is void, under sect. 38, on account of losses by gambling, and, if he considers the gambling to be proved, should refuse the application. And he may receive evidence of several distinct cases of loss by gambling within sect. 38.

WATSON, in last term (*a*), moved for a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Keeper of the Queen's Prison, as to this action. Defendant was arrested in *August* 1845, upon a ca. sa. on a judgment recovered in this Court against him by the plaintiff. In *June* 1846, a fiat in bankruptcy was issued against him, directed to the Commissioner of the *Bristol* Court of Bankruptcy; and he afterwards obtained his certificate of conformity, which was confirmed by the Court of Review. Afterwards, on 7th *October* 1846, he took out a summons to shew cause before a Judge why he should not be discharged out of custody as to this action, on the ground that the debt therein claimed was proveable under the fiat. The summons was heard before *Erle* J., when the certificate, duly enrolled, was produced; but affidavits in opposition were put in, to the effect that the defendant had lost 20*l.* by gaming in one day; and the learned Judge, under sect. 38 of stat. 5 & 6 *Vict. c.* 122., declined to order the discharge. The defendant caused a second summons to be taken out, which was heard before the same Judge;

(*a*) *November* 2d, 1846. Before Lord *Denman* C. J., *Coleridge*, *Wightman* and *Erle* Js.

when the defendant offered affidavits to negative the alleged gambling; but his Lordship refused to suffer them to be read, and dismissed the summons with costs. The defendant now deposed that he had had no opportunity of answering the affidavits in which the gambling was sworn to; but that the same charge had been made in opposition to the granting of his certificate before the *Bristol* Court, which had nevertheless granted the certificate. And he now deposed that the affidavits in question were false.

Watson urged that the defendant was entitled to his discharge under stat. 5 & 6 *Vict. c.* 122. *s.* 42. That section provides that the bankrupt shall be discharged from execution on any judgment obtained before the confirmation, "on such bankrupt's producing his certificate." It was here produced, having been duly filed. It cannot have been intended, by sect. 38, to allow the application to be met by an affidavit which the bankrupt has no opportunity of answering. The objection to the certificate might be properly raised to meet a plea to an action on the judgment; or the imputed gambling might be made a ground for an application to the Court of Review to avoid the certificate. [*Coleridge* J. What power have we to discharge the prisoner? Sect. 42 only authorises a "Judge of the Court wherein judgment has been so obtained" to order the discharge.] The Court of Exchequer certainly decided that they had no original jurisdiction to order stock to be charged under stat. 1 & 2 *Vict. c.* 110. *s.* 14., and that they could not interfere where a Judge at chambers had refused to make the order, though, if he had made such an order,

the full Court must have reviewed it (*a*). But here the Court may at any rate deal with its own process. [*Coleridge* J. You are applying under the statute. Do you say you were entitled to make this motion without applying to a Judge at chambers at all?] That seems to follow from the defendant being in execution on a judgment of this Court.

Cur. adv. vult.

Lord DENMAN C. J., in the same term (*November* 10th), delivered the judgment of the Court.

This was a motion to discharge a bankrupt prisoner from execution on a judgment obtained before the prisoner obtained a confirmation of his certificate of conformity. The application was first made to my brother *Erle*, who, upon affidavits being produced shewing that the bankrupt had lost more than 20*l.* in one day by gambling, refused to order the discharge; and who, on a second application, refused to hear affidavits negativing the loss by gambling. The prisoner now applies to this Court on affidavits negativing such loss. But we think that the Court has no power to act under sect. 42 of stat. 5 & 6 *Vict. c.* 122., which gives the power to a single Judge only. That puts an end to the present application. We do not say so on the ground that the learned Judge has decided finally or that a second application could not be made to him, or on the merits. We simply decide that we have no jurisdiction to entertain the application. We say nothing against another application to the Judge at chambers.

Rule refused.

(*a*) *Brown* v. *Bamford*, 9 *M. & W.* 42. See *Morris* v. *Manesty*, 7 *Q. B.* 674.

Another summons was afterwards taken out, and heard before *Erle* J., when affidavits were produced to negative and to establish the charge of a loss by gambling to an amount sufficient to avoid the certificate. The learned Judge ordered the summons to be dismissed with costs.

Watson, in this term (*a*), moved to rescind the order. The application is not now for the discharge of the defendant, but to rescind the order, under which he is called upon to pay costs. The Judge had no power, under sect. 38, to treat the certificate as void; the proper mode of insisting on that section is to raise the point when the certificate is to be allowed or confirmed. If a bankrupt be arrested on mesne process for a debt proveable under the fiat, he may, by sect. 42, be discharged upon entering an appearance; and he may plead that the cause of action accrued before the bankruptcy; and the certificate and its confirmation will be sufficient evidence of all the proceedings in bankruptcy. [*Patteson* J. I do not understand what can have been meant by the provision as to the arrest on mesne process: could it be intended that a party arrested under a Judge's order should be discharged on entering an appearance? *Coleridge* J. Do you say that, if the certificate be allowed and confirmed, and the loss by gambling be afterwards discovered, the certificate must stand good?] The certificate may in that case be avoided by the Court of Review. Under the old law, certificates were avoided upon a case being properly

(*a*) *January* 13th. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Erle* Js.

made out before the Court which had jurisdiction in bankruptcy; *Ex parte Tallis* (*a*), *Ex parte Cawthorne* (*b*), *Ex parte Hood* (*c*) (where it was held that the case ought to be beyond doubt), *Bailey* v. *Vincent* (*d*). In *Ex parte Dodson* (*e*) the Court refused to stay the certificate, because the petitioner had a remedy at law. The old law remains, except so far as it is inconsistent with stat. 5 & 6 *Vict. c.* 122., by sect. 2. The Court of Review may direct an issue; stat. 1 & 2 *W.* 4. *c.* 56. *s.* 4. The judgment creditor would have the means of enforcing the objection to the certificate on debt or scire facias on the judgment. [*Patteson* J. There is a case in *Buck's Reports* (*g*), where the Court refused to discharge a bankrupt from arrest without giving an opportunity to the plaintiff to shew that the certificate was fraudulently obtained.] The mode here pursued would make the litigation almost endless. Under the old law, any thing vacating the certificate might be proved under the similiter to a plea of bankruptcy concluding to the country; *Hughes* v. *Morley* (*h*): but only one case of gambling could be proved; *Hughes* v. *Morley* (*i*) at Nisi prius. Any number of such acts might be set up, to be tried on affidavits, if this mode of proceeding were allowed (*k*).

Cur. adv. vult.

(*a*) 1 *Rose*, 371.
(*b*) 2 *Rose*, 186.
(*c*) 1 *Gl. & Jam.* 219.
(*d*) 5 *Mad.* 48, 49.
(*e*) *Buck*, 225.
(*g*) Probably *Nowers* v. *Colman*, *Buck*, 5. See also *Woolcot* v. *Leicester*, 6 *Taunt.* 75., mentioned in the Index to *Buck's Reports*, p. 615.
(*h*) 1 *B. & Ald.* 22.
(*i*) *Holt's N. P. C.* 520.
(*k*) In fact, several alleged losses by gambling were insisted upon in the present case.

Lord DENMAN C. J., in this term (*January* 29th), delivered the judgment of the Court.

In this case the defendant had applied by summons to be discharged out of custody in execution, on the ground that he had obtained his certificate in bankruptcy; stat. 5 & 6 *Vict. c.* 122. *s.* 42. This was opposed under sect. 38, on the ground that he had lost 20*l.* at one sitting by gaming; and my brother *Erle*, being of opinion that that fact was proved, dismissed the summons with costs.

Mr. *Watson* moved for a rule to rescind this order, on the ground that the production of the certificate entitled the bankrupt to his discharge, that the Court in bankruptcy had exclusive jurisdiction to try whether a certificate was void for gaming, or, if the fact was cognizable in the Courts of common law, it was so only before a jury, and not by affidavit before a Judge; and that therefore an order for discharge ought to have been made, notwithstanding the alleged gaming.

We are of opinion that effect must be given, in any Court called on to act on a certificate, to the 38th section, which renders a certificate void in certain events: the Court or Judge, where the certificate is offered, must act judicially; and, if the certificate is alleged to be void, in other words to be no certificate, must decide that question; and, if the determination of it depends on a matter of fact, must ascertain that fact in the same manner as any other which may be in question before them. These principles were acted on under an analogous statute, both at Nisi Prius and in Banc, in *Hughes* v. *Morley* (*a*).

(*a*) *Holt's N. P. C.* 520.; 1 *B. & Ald.* 22.

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WEARING v. SMITH.

It was said in this case that the creditor who objects to the certificate must allege a single fact for the avoidance thereof, and must confine himself to that fact. Upon this we would observe that we are not aware of any principle of law which would support this as a general rule. And the rule is refused.

Rule refused (*a*).

(*a*) See *Clark* v. *Smith*, 3 *C. B.* 982.

Monday, February 1st.

LAMOND and Others *against* DAVALL.

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Where goods are sold on condition that, if they are not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute.

Therefore, if the vendee do not pay at the time, and the vendor resell at a loss, he cannot maintain assumpsit for goods bargained and sold, or goods sold and delivered.

And the defence may be raised on Non assumpsit.

ASSUMPSIT for shares, share certificates, scrip and scrip receipts, bargained and sold, for shares, &c. (as before) sold and delivered, for money paid, for interest, and on an account stated. Plea: Non assumpsit.

On the trial, before *Erle* J., at the *Middlesex* sittings during this term, it appeared that the plaintiffs, who were auctioneers, had sold the shares by auction to the defendant at 79*l.*, and had afterwards resold them at 63*l.*, and were now suing for the 79*l.*, under the following circumstances, as stated by Lord *Denman* C. J. in delivering the judgment of the Court.

"It appeared that the goods had been knocked down to the defendant at an auction by the plaintiffs: that it was a condition of the sale that the goods might be resold, unless the purchase money was paid on the following day, the bidder so making default being answerable for the loss on resale: that the plaintiffs had exercised this right, and had received 63*l.* from a re-

sale. The defendant contended for a nonsuit, because the power of resale was in effect a condition for making void the sale; the evidence was, therefore, of a conditional sale which had been made void, whereas the declaration was on an absolute sale still subsisting. The learned Judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiff." In this term (*a*),

Ogle moved to enter a verdict for the plaintiff for such sum as the Court should think fit. The course of the argument sufficiently appears from the judgment.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was an action for 79*l.*, for goods bargained and sold. (His Lordship then stated the facts, as above.)

Mr. *Ogle* moved accordingly, and contended that the original sale was absolute, and that the resale by the plaintiff was as agent for the defendant. And he cited *Mertens* v. *Adcock* (*b*), where a vendor had recovered for goods bargained and sold, after a resale. He also contended that, under the plea of Non assumpsit, the defence was not admissible.

But we are of opinion that the nonsuit was right. It appears to us that a power of resale implies a power of annulling the first sale, and that, therefore, the first sale is on a condition, and not absolute. There might be inconvenience to the vendor if the resale was held to

(*a*) *January* 21st. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Erle* Js.

(*b*) 4 *Esp. N. P. C.* 251.

be by him as agent for the defaulter; and there is injustice to the purchaser in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses.

The ruling at Nisi Prius in *Mertens* v. *Adcock* (*a*) is contrary to the opinion of *Gibbs* C. J., expressed in *Hagedorn* v. *Laing* (*b*): and in *Maclean* v. *Dunn* (*c*) the action for damages for the loss on resale is spoken of as the proper course where the power of resale is exercised without an express stipulation for it.

Rule refused.

(*a*) 4 *Esp. N. P. C.* 251. (*b*) 6 *Taunt.* 162.

(*c*) 4 *Bing.* 722. 728. During the argument of the present case, *Patteson* J. referred to *Acebal* v. *Levy*, 10 *Bing.* 376. 384.

Pollock and Another *against* Stacy.

Monday, February 1st.

ASSUMPSIT for use and occupation, and on an account stated. Pleas: 1. Except as to 1*l.* 5*s.*, Non assumpsit: Issue thereon. 2. As to 1*l.* 5*s.*, a tender: Replication, traversing the tender: Issue thereon.

The particulars claimed 22*l.* 10*s.*; viz. 2*l.* 10*s.* for two weeks' use and occupation of apartments from 26th *May* to 8th *June* 1846, at 1*l.* 5*s.* per week; and 20*l.* for 20 weeks' use and occupation of apartments from 9th *June* to 26th *October* 1846, at 1*l.* per week.

On the trial, before *Erle* J., at the *Middlesex* sittings in this term, a verdict was found for the plaintiffs on the first issue and for the defendant on the second, under the following circumstances, as stated by Lord *Denman* C. J. in delivering judgment on the after mentioned motion.

"This was an action for the use and occupation of a part of a house from *June* to *October*. And, at the trial before my brother *Erle*, it was proved that the plaintiffs, being lessees from *May* till the 13th *December*, let by parol the premises to the defendant till the latter day (*a*), reserving a weekly rent: that the parties intended to create the relation of landlord and tenant, and to pass the interest by lease (*b*): that the defendant occupied and paid rent till *June*, and then gave a week's notice to

Where a party, entitled to a term in land, demises the land to another, at a weekly rent, for the whole of such term, and it is the intention of the two to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quitted accordingly.

Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising.

(*a*) One part of the premises was held by the plaintiffs and let to the defendant for a shorter time; but no distinct legal question arose on this.

(*b*) This was so found by the jury, in answer to a question from the learned Judge.

quit, and, at the expiration thereof, returned the key, against the will of the plaintiffs, and left the premises vacant, and refused to pay any subsequent rent.

"Upon these facts, the defendant objected that, as the plaintiffs intended to part with all their interest in the premises, they must be taken to have intended an assignment, and that the transaction could not take effect as an assignment, as there was no writing nor deed, as required by stat. 29 *C.* 2. *c.* 3. *s.* 3. and stat. 8 & 9 *Vict. c.* 106. *s.* 3.; and that therefore the defendant was not liable beyond the time of his actual occupation. The learned Judge was of opinion that the intention of the parties at the time of the contract could be effected by holding that the interest passed by way of lease, and directed the verdict for the plaintiffs, with liberty for the defendant to move for a nonsuit."

Lush, in this term (*a*), moved accordingly. The course of the argument sufficiently appears from the judgment (*b*).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the facts (as above), his Lordship proceeded as follows.

Mr. *Lush* moved accordingly, on the same ground, and contended that *Poultney* v. *Holmes* (*c*), in which the same construction was maintained, had been overruled in the case of *Barrett* v. *Rolph* (*d*), and referred to *Parmenter*

(*a*) *January* 21st. Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Erle* Js.

(*b*) *Lush*, besides the authorities cited in the judgment, referred to *Edge* v. *Strafford*, 1 *C. & J.* 391.; *S. C.* 1 *Tyrwh.* 293. (The same paging occurs twice).

(*c*) 1 *Str.* 405.

(*d*) 14 *M. & W.* 348.

v. *Webber* (*a*) and *Smith* v. *Mapleback* (*b*), to establish that the transaction was an assignment and not a lease, and was therefore void.

But we are of opinion that the plaintiffs are entitled to recover.

The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease. This they were at liberty to do by law; and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only; and we should construe that which was expressed and intended to be a lease to be an assignment, merely *ut res pereat*, which is against a known salutary maxim.

As important rights and duties arise often from assignments of terms, the law has properly provided that the relation of assignor and assignee shall not be contracted unless the intention is proved by deed. But, in protecting against imperfect evidence of assignment, there was no need to alter the law of leasing; and it appears to us to remain unchanged: and we see no inconvenience in supporting as a lease that which was intended to be so, although it may pass all the lessor's interest.

In *Poultney* v. *Holmes* (*c*) a lease of all the lessor's interest was supported as a lease. This case is cited as valid, but distinguished, in *Palmer* v. *Edwards* (*d*), in which it was decided that an instrument expressed to be an assignment may operate as such, although rent is

(*a*) 8 *Taunt.* 593. (*b*) 1 *T. R.* 441.

(*c*) 1 *Str.* 405.

(*d*) Note [†59] to *Holford* v. *Hatch*, 1 *Doug.* 187.

thereby reserved to the assignor. In *Preece* v. *Corrie* (*a*) the above doctrine was confirmed; and it was held that the lessee held of the lessor although there was no reversion. In *Baker* v. *Gostling* (*b*) this doctrine was again confirmed, and *Poultney* v. *Holmes* (*c*) cited and acted on. The defendant has relied on *Barrett* v. *Rolph* (*d*) overruling *Poultney* v. *Holmes* (*c*). But the case is not decided on this point: a compromise is recommended and adopted, to prevent a new trial: also the parties there probably intended an assignment, and not a lease; and, if so, the doctrine would not apply. Also, throughout the argument, this doctrine is mentioned with approval by the Court, although it is doubted in the conclusion. Upon this review of the authorities, we do not consider that the case of *Poultney* v. *Holmes* (*c*) has been overruled.

As to the other cases cited, viz. *Parmenter* v. *Webber* (*e*) and *Smith* v. *Mapleback* (*g*), they decide that such a lessor cannot distrain, not having any reversion. This is not disputed: but the negation of the right to distrain does not at all imply a negation of a right to sue for use and occupation.

Therefore the rule is refused.

Rule refused.

(*a*) 5 *Bing.* 24.
(*b*) 1 *New Ca.* 19.
(*c*) 1 *Str.* 405.
(*d*) 14 *M. & W.* 348.
(*e*) 8 *Taunt.* 593.
(*g*) 1 *T. R.* 441.

DOE on the demise of Viscount DOWNE *against* THOMPSON.

Viscount DOWNE *against* THOMPSON.

THESE two actions were tried before *Wightman* J., at the *Yorkshire* Spring assizes, 1845, when a verdict was found for the lessor of the plaintiff in the first case, and for the plaintiff in the second, with liberty, in each case, to move for a nonsuit.

A., seised in fee, mortgaged in fee to *B.*, and afterwards leased to defendant.

D. purchased the legal estate from *B.*, and also the equitable estate from a party who derived it from *A.*, which party also joined in the conveyance of the legal estate.

Held, that *D.* though he had received rent from defendant, was not bound by *A.*'s lease to him, but might recover against defendant in ejectment after expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent.

In the ejectment the facts were as follows, according to the statement of Lord *Denman* C. J., in delivering the judgment of the Court.

"In 1819, *Thomas Burton*, being seised in fee of the premises in question, conveyed them, inter alia, to *John Bromet*, his heirs and assigns, subject to redemption on payment of 1000*l.* In 1827, *Thomas Burton* demised to the defendant, by indenture for thirty one years. In the same year, part of the mortgaged premises were sold, and 900*l.* paid off. In 1828, *Thomas Burton* became bankrupt, and afterwards died. In *February* 1834, Messrs. *Swann* paid *Bromet* 100*l.*, and took from him a conveyance in fee (*a*). On the 22d *May* 1834, the assignees of *Thomas Burton* sold the premises to Lord *Downe* for 245*l.*, 100*l.* of which was paid to Messrs. *Swann:* and they, by direction of the assignees, conveyed to Lord *Downe* in fee, the assignees also being parties and joining in the conveyance (*b*)."

(*a*) Subject to the equity of redemption then subsisting.

(*b*) This conveyance recited the conveyances to *Bromet* and Messrs. *Swann*, the bankruptcy, and the assignment: and it described the premises as formerly in the tenure and occupation of *Burton*, but now of *Thompson*, his undertenants or assigns, but did not refer to the lease. Messrs. *Swann* bargained, sold, and released; and then the assignees of *Burton* released, ratified, and confirmed.

Lord *Downe*, after receiving rent for two years, gave notice to quit, at the expiration of which he brought the ejectment.

Viscount Downe v. *Thompson* was an action against *Thompson* for an occupation of the same land for a period subsequent to the last payment and receipt of rent by Lord *Downe*.

In *Easter* term, 1845, *Hugh Hill*, pursuant to the leave reserved, obtained, in each case, a rule nisi for entering a nonsuit.

The two rules were argued together in last *Trinity* vacation (*a*), when

Rew shewed cause. First, without reference to the fact of *Burton's* assignees having joined in the conveyance to Lord *Downe*, the question as to his title is, whether the party claiming through the mortgagee is estopped by the lease of the mortgagor in possession, made after the mortgage. The authorities shew that he is not; even by receiving rent he does not set up the lease, but only creates a new interest in the party paying, which, if the rent be paid yearly, will be a tenancy from year to year; *Rogers* v. *Humphreys* (*b*), *Evans* v. *Elliot* (*c*), *Partington* v. *Woodcock* (*d*), *Brown* v. *Storey* (*e*), *Doe dem. Higginbotham* v. *Barton* (*g*). Then is the case altered by the mortgagor's assignees having joined? Lord *Downe* took from them only the equitable estate. [*Patteson* J. If the conveyance had been from the assignees only, I suppose you admit that he would

(*a*) *June* 20th, 1846. Before Lord *Denman* C. J., *Patteson* and *Wightman* Js.

(*b*) 4 *A. & E.* 299.

(*c*) 9 *A. & E.* 342.

(*d*) 6 *A. & E.* 690.

(*e*) 1 *M. & G.* 117.

(*g*) 11 *A. & E.* 307.

have been estopped: does he get rid of the estoppel by taking a conveyance of the legal estate also?] The assignees could only have conveyed subject to the mortgage. Suppose the mortgagor had made a second mortgage for a thousand years: could that estop a party who purchased the legal estate of the first mortgagee from insisting on such legal estate? In respect of the legal estate, Lord *Downe* is neither party to the lease, nor privy in blood (as in *Weale* v. *Lower* (*a*)) or estate. He could not, in law, have insisted on the covenants in the lease which run with the land; *Webb* v. *Russell* (*b*), *Pargeter* v. *Harris* (*c*). On the face of the conveyance to Lord *Downe*, it appears that the assignees of the mortgagor had no legal interest; and the lease to the defendant is not mentioned; it is only said, by way of description, that the premises are in the occupation of the lessee. There is therefore no estoppel. [*Patteson* J. The defendant, according to your argument, would be a trespasser; yet the conveyance seems to recognize the lawfulness of his possession.] It does not follow that, because he was not in possession under the lease, he could be treated as a trespasser by those claiming under the mortgagee: in one case (*d*) Lord *Denman* C.J. carefully guarded himself against adopting such a conclusion. In *Pargeter* v. *Harris* (*e*) this Court pointed out that *Gouldsworth* v. *Knights* (*g*) had been misunderstood. But, in any view, the latter case could not apply to this: for there the title by estoppel was grounded on the fact, that the party (trustees) insisting upon it had taken the legal title from the party (former trustees) to whom rent

(*a*) *Pollexf.* 54.
(*b*) 3 *T. R.* 393.
(*c*) 7 *Q. B.* 708.
(*d*) *Evans* v. *Elliot*, 9 *A. & E.* 355.
(*e*) 7 *Q. B.* 728.
(*g*) 11 *M. & W.* 337.

had been paid by the party estopped; here Lord *Downe* claims under a legal title altogether independent of any title which *Burton* had at the time of making the lease. The doctrine of estoppel in this respect is explained in 4 *Bac. Abr.* 855, 856. (7th ed.), tit. *Leases and Terms for Years* (O), whence it appears that Lord *Downe*, if he had been enfeoffed by *Burton* after the lease, would have been estopped: but he claims through a conveyance of the fee made before the lease. [*Patteson* J. The defendant would be estopped, by your purchase of the title of the lessor, the equitable owner, from disputing your title: it seems strange that you should not be estopped too.] The deed conveying to Lord *Downe* gives the legal estate before the conveyance by the assignees comes in: the order of two acts may not unreasonably determine their effect. But suppose there had been two contemporaneous deeds conveying, one the legal estate, the other the equitable: could not Lord *Downe* have sued on the legal estate alone? *Webb* v. *Austin* (*a*), which may be cited, shews that a mortgagee may, in some instances, set up the lease of the mortgagor; but it does not shew that this is done by merely accepting a conveyance of the legal title to which the mortgagor is a party. The lease, according to the doctrine in *Bacon*, would be set up by the mortgagee conveying to the mortgagor: then the mortgagee, who before would be bound only by way of estoppel, would have his legal interest bound; and so would any one taking from him after the lease was made. Perhaps it will be argued, on the authority of the class of cases to which *Partridge* v. *Bere* (*b*) belongs, that the mortgagor retained a legal interest after the mortgage. [*Hugh Hill*, contrà. That

(*a*) 7 *M. & G.* 701. (*b*) 5 *B. & Ald.* 604.

point will not be made.] The estoppel, if it exist, ought to be mutual. But, if Lord *Downe* were to sue this defendant on the covenants in the lease, he would have to shew, in pleading, first, the title of *Burton* against the defendant; secondly, that *Burton*'s title had come to him, Lord *Downe*. The first he could probably shew by estoppel: but, when he came to the second, he could only set up his title by referring to the deed, of which the defendant would crave oyer; and the deed would shew that *Burton* had conveyed no legal title; and there is no estoppel by a deed which shews the true facts. *Whitton* v. *Peacock* (*a*) will probably be considered as overruled, and therefore is not relied upon. A decision in favour of the defendant would be an extension of the doctrine of estoppel: whereas it is a recognised principle that estoppels are not to be favoured.

Next, supposing Lord *Downe* to be bound by the lease, he may still recover in debt for use and occupation, though, the lease being by deed, he could not have brought assumpsit. (On this point he cited *Gibson* v. *Kirk* (*b*), *Atty* v. *Parish* (*c*), and *Tilson* v. *The Warwick Gas Light Company* (*d*): but the judgment of the Court renders it unnecessary to report this part of the argument.)

Hugh Hill, contrà. The defendant is entitled to consider Lord *Downe* as taking from the mortgagor: that this is effected by a conveyance to which the representatives of the mortgagee, as well as those of the mort-

(*a*) 2 *New Ca.* 411. See *Webb* v. *Austin*, 7 *M. & G.* 701.: note (*e*) to *Walton* v. *Waterhouse*, 2 *Wms. Saund.* 418 *c*.

(*b*) 1 *Q. B.* 850. (*c*) 1 *New R.* 104.

(*d*) 4 *B. & C.* 962. See *Edwards* v. *Bates*, 7 *M. & G.* 590. 600.

gagor, are parties, can make no difference. "Si *A.* mortgage terre in fee al *B.* sur condition de reenter sur payment de deners, et puis il esteant en possession ceo demise per indenture al *C.* et puis performe le condition, et fit feffment al *D. D.* serra lie et estopp d' avoider le leas tam bien come *A.* mesme, pur ceo que il clayme desouth *A.* que fuit estopp;" 1 *Roll. Abr.* 876. tit. *Estoppell* (V), pl. 5. That a lease by a mortgagor may be made good by the concurrence of the mortgagee is decided in *Webb* v. *Austin* (*a*). In *Weale* v. *Lower* (*b*), cited and relied upon in the judgment there, a lease, originally good only by estoppel against the lessor, was held to bind the lessor's heir upon the legal interest afterwards vesting in him. Similar instances are given in *Com. Dig. Estoppell* (B). *Trevivan* v. *Lawrance* (*c*) also shews that a party who leases without having an interest is bound by estoppel; and that, if he afterwards obtain the legal interest, that is bound by the lease; and that this estoppel binds all who take a conveyance from him. Therefore, if Lord *Downe* had first purchased from the mortgagor, so as to be estopped, and had afterwards bought the legal estate, he would have been bound, just as the mortgagor himself would have been if he had bought the legal estate. The same result must follow where all is done by one conveyance. Priority of words can make no difference, any more than priority of execution by the parties. The difficulty suggested on the other side, as to the pleading, in the case of an action on the covenants by Lord *Downe*, does not arise: it would be enough to aver that all the lessor's interest passed, which the deed would prove.

(*a*) 7 *M. & G.* 701.
(*b*) *Pollexf.* 54.
(*c*) 1 *Salk.* 276.

Then, Lord *Downe*, being estopped by the lease which is by deed, cannot sue for use and occupation. (He referred to *Beverley* v. *The Lincoln Gas Light and Coke Company* (*a*): but the argument is omitted, for the reason before given.)

Cur. adv. vult.

Lord Denman C. J., in this term (*January* 14th), delivered the judgment of the Court in both cases.

Doe dem. Viscount Downe *v.* Thompson.

The facts of this case are as follows. (His Lordship then stated the facts as antè, p. 1037.)

The question is whether Lord *Downe* is estopped by the lease for thirty one years, or whether he is entitled to recover, having given a regular notice to quit after receiving rent for two years.

The lease was good against *Thomas Burton* by estoppel only: he had not the legal estate when he granted it; nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption; and they could pass nothing else to Lord *Downe*. The legal interest has passed to Lord *Downe* wholly and entirely from Messrs. *Swann*, who were not privies to, nor in any way estopped by, the lease; neither can Lord *Downe* be estopped in respect of the interest which he took from them. Doubtless, if Lord *Downe* had taken the legal interest from *Burton*, he would have been estopped in the same manner that *Burton* would,

(*a*) 6 *A. & E.* 829. 839.

Doe dem. Lord Downe v. Thompson. Lord Downe v. Thompson.

as was held in *Trevivan* v. *Lawrance* (*a*) and other cases; and particularly see the case of *Right dem. Jefferys* v. *Bucknell* (*b*), in which the doctrine of estoppel was fully considered. But, as he took nothing in the land from either *Burton* or his assignees, no estoppel could affect him through them. And, as those from whom he did take the land were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. *Swann* alone conveyed. This rule for a nonsuit must therefore be discharged.

Rule discharged.

Viscount Downe *v.* Thompson.

This rule for a nonsuit must also be discharged. If Lord *Downe* is not bound by the lease for thirty one years, it follows that the defendant was tenant from year to year only; and an action of debt for use and occupation is well brought.

Rule discharged.

(*a*) 1 *Salk.* 276. (*b*) 2 *B. & Ad.* 278.

END OF HILARY TERM.

AN

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In the same case, the action against one defendant having been tried, and a rule nisi granted for a new trial on a ground involving the amount to be ultimately recovered in it, the Court refused to stay proceedings in an action against another of the defendants until the first was determined. *Newton* v. *Belcher*, 612.

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In assumpsit to recover from an Insurance Company the amount secured by a policy in favour of *W.* on his own life, defendant (the secretary) pleaded bankruptcy of *W.* Replication. That, before the bankruptcy and the making of the policy, one *D.*, in whose right the present action was brought, agreed with *W.* to lend him 1000*l.*, which should be secured by a policy of insurance on *W.*'s life: That *R. L.*, an attorney, acted in the said business of the said agreement as attorney for the lender, and that, in pursuance of the agreement, *R. L.*, then being also an agent for the Company, duly authorised in that behalf, in and about effecting life insurances with them, and otherwise, caused the policy to be effected on *W.*'s life for the purpose and on the terms aforesaid, and took possession of the policy on behalf of *D.*, the lender, in pursuance of the agreement, and for the purpose and on the terms aforesaid, and that the policy was never in the hands of *W.* or his assignees: That *D.* thereupon lent *W.* the 1000*l.*, and *W.*, in pursuance of the agreement, assigned the policy by indenture to *D.*: That the debt, exceeding the amount secured by the policy, was, at the time of the bankruptcy, and is, unpaid: And that, before the bankruptcy, *D.*, the lender, for the purpose of keeping up the policy, paid to the Company, and they received from him, divers sums for premiums in and about keeping the policy on foot and preserving to *D.* the benefit of it: Which said premises respectively the Company, before and at the time of the bankruptcy, well knew.

Rejoinder, that *W.*, when he became bankrupt, had the chose in action in his possession &c. by consent of *D.*, the true owner, and was then reputed owner thereof. This allegation was traversed, and issue joined on the traverse.

On the trial, it appeared that the policy and assignment were effected at *Tiverton*, where *R. L.* was at that time transacting insurance business for the Company as their agent, receiving and transmitting to them (their office being at *Exeter*) instructions for policies and money for premiums, settling losses, and receiving agency fees. No actual

notice of the assignment was ever given to the Company; but the plaintiff's counsel relied upon the facts stated in the replication, and not traversed, as proving, by admission on the defendant's part, that *R. L.*, as the Company's agent, had effected the policy and knew of the assignment; and they contended that such knowledge by him was, in effect, notice to the office. The Judge allowed the facts to be so put to the jury, and did not permit a reply. Verdict for plaintiff.

Held, on motion for a new trial, that some of the facts stated in the replication were not traversable, and, therefore, assuming that the others might properly have gone to the jury as admitted, a new trial must be granted.

Quære, whether, if all the substantial facts relied upon by the plaintiff had been proved, the attorney's knowledge was a knowledge by the Company, equivalent to notice.

A new trial being granted on the above objection (and for an inaccurate expression in the Judge's charge to the jury), it was proved on the second trial that the Company had authorised *R. L.* to receive notices on their behalf, and had agreed that a notice to him should be as valid as a notice to them at their office.

Held that, under these circumstances, knowledge by *R. L.*, as above stated, was equivalent to notice served on the Company.

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The arbitrator did not make his award within the six months, conceiving that he was not bound, nor in a condition, to do so, till the commissioner had made his, which had not yet been done. The Court being of opinion that he was mistaken in this,

Held: that, although the arbitrator should not have been otherwise blameable, the erroneous omission to make his award in time was a "neglect" to act, and warranted the appointment of another arbitrator.

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In an action for penalties under the statute, the declaration alleging that plaintiff was carried to *Whitecross Street* prison without his free and voluntary consent, although he did not refuse &c., to which Not guilty was pleaded; the evidence being that plaintiff went to prison under the circumstances above stated; and there being proof that he went there for the purpose of enabling himself to recover damages; particularly, that he had told his creditor after the arrest that if an arrangement were declined he would go to *Whitecross Street* prison: Held, that the Judge directed the jury properly on the issue joined, by desiring them to say whether plaintiff went to prison for want of being informed of his right to go to a house of his own nomination, or whether he elected, for purposes of his own, to go to prison. *Gordon* v. *Laurie*, 60.

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To a count on an account stated, it is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered.

In such pleas, it is a sufficient confession to state that the action is brought to recover the amount of

charges "by the plaintiff *claimed and demanded* to be due to him from the defendant for work done" &c., "and that the work was done by plaintiff for defendant as his attorney and not otherwise." So held on special demurrer. *Scudding* v. *Eyles*, 858.

2. Where bill formerly not taxable, when to be delivered.

The clause (sect. 37) of stat. 6 & 7 *Vict. c.* 73., making attorneys' bills taxable though the business was all transacted out of Court, is retrospective; but delivery of a bill for such business, done before the act passed, is not valid unless the bill was delivered since the passing of the act, as well as one month before commencing an action.

Quære, whether an action may be commenced since the statute without delivery of a new bill, where a bill has been delivered, and the charges were taxable, before the statute.

In an action for an attorney's charges, if the plaintiff fails on the count for work and labour because no bill has been delivered, he cannot recover under a count upon an account stated, though he prove that the charges were assented to by the client. *Brooks* v. *Bockett*, 847.

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One *B.*, to whom the mortgage had been transferred, commenced actions of ejectment and other proceedings to enforce payment. Plaintiff acted as his attorney; and proceedings were stayed on condition, among others, that defendant (who was not a party on the record in the ejectments) should pay the now plaintiff his bill of costs delivered to *B.* Defendant paid plaintiff the bill, but afterwards (and before stat. 6 & 7 *Vict. c.* 73.), obtained a Judge's order for taxation of this latter bill, with a direction that any sum overpaid should be refunded. Plaintiff gave no consent to the order; but he attended the taxation, and made a new claim, which was allowed; and he was ordered by the allocatur to refund 10*l.* as overpaid.

Held that, in the action by Plaintiff against defendant on his bill of costs, the 10*l.* could not be set off as money had and received to defendant's use;

a Judge's order, without consent, being no ground for a claim in the nature of an action of contract. *Phillips* v. *Broadley*, 744.

X. Power of. *Power of Attorney.*

AUDIENCE.

Exclusive, 279. *Barrister.*

AUTHORITY.

I. Evidence of, against member of provisional committee, 936. *Company*, II. 1.

II. Of attorney to bind client, 936. *Company*, II. 1.

III. Of receiver for infant ward in Chancery, 623. *Trespass*, I.

AVERMENT.

When it must be direct, 130. *Replevin*, II. 1.

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I. At common law, 14. *Distress*, I.

II. Positive form, 130. *Replevin*, II. 1.

AWARD.

Arbitration.

BAIL.

I. After removal of case by habeas, 869. *Procedendo.*

II. Before setting aside procedendo, 869. *Procedendo.*

BANC.

Court in, 1024. *Bankrupt*, IX. 1.

BANK.

I. Usage of bankers.

1. How pleaded, 396. *Bank of England*, I. 1.

2. How proved, 396. *Bank of England*, I. 1.

III. Discount.

Of note not due, 396. *Bank of England*, I. 1.

BANK OF ENGLAND.

Payment of dividends by.

1. By warrant.

Declaration alleged that plaintiff was proprietor of a share in the $3\frac{1}{2}$ reduced annuities, in the management of defendants (Governor &c. of *The Bank of England*) for certain reward &c., and was entitled to receive certain dividends, his share standing in the books for the purpose of their paying him, on request, the accruing dividends, when sufficient money had been received by them: whereupon defendants became liable, and it was their duty, to pay plaintiff on request, when sufficient money had been received by them, all dividends due to him: that while plaintiff was possessed of the share, a dividend became due to him, and sufficient money had been received by defendants &c., and they were requested by plaintiff to pay him his dividend, and a reasonable time had elapsed: but they had not paid.

Plea: that by usage and custom of bankers and merchants in *London*, for divers, to wit sixty, years past, the drafts of defendants upon their cashiers, called dividend warrants, are transferable and assignable by delivery only, and a bonâ fide holder thereof is entitled to payment by defendants on demand: that *W.* had received from defendants such warrant for payment of the dividend in question, under a power of attorney from plaintiff, authorizing *W.* to receive and give receipts for dividend, and had delivered the warrant to *L.* for good consideration then moving from *L.* to *W.*, and that *L.*

while lawful holder of the warrant, had demanded payment from defendants and required them to hold the money for his use.

Held, by the Court of Q. B,, on a replication traversing the above allegations, except the execution of the power and delivery to *W.*;

1. That the allegation of usage was satisfied by proof that dividend warrants, with the receipt subscribed, are passed from hand to hand like bank notes, and are paid by the Bank cashiers to any one who presents them after a certain day:

2. That the alleged consideration was proved by shewing that, before the dividend was due, *L.*, a banker, had discounted a promissory note of and for *W.*, his customer, payable on a day subsequent to the delivery of the warrant by *W.* to *L.*, and that the warrant was delivered to secure payment to *L.* of the note when due; although at the time of delivery the cash balance at *L.*'s bank was in favour of *W.*, and the note was not due till after the day for payment on the warrant.

But, Held, by the Court of Exchequer Chamber, that the plaintiff was entitled to judgment on the record: because,

1. The power, as pleaded, did not authorize receiving payment by a warrant: and it did not appear, by plea or by any statute, that it was a usual mode of paying dividends to give a warrant.

2. It did not appear that defendants had become liable to pay *L*,, the warrant not being negotiable by the general law, and the supposed custom not appearing to be an immemorial custom in the particular place, nor an usage of trade of which plaintiff was cognisant.

3. *L.* was not averred to be a bonâ fide holder, but only to have taken for value; and the averment, as above, of his being lawful holder, did not supply the defect. *Partridge* v. *Bank of England*, 396.

2. Negotiability of dividend warrants, 396. *Antè*, 1.

II. Usage of.

As to payment of dividends, 396, *Antè*, I. 1.

BANKRUPT.

I. Preliminary proceedings.

Summons under stat. 5 & 6 *Vict. c.* 122. *s.* 11., 114. *Post*, IV.

II. Act of bankruptcy, generally.

When it is completed, 873. *Post*, III. 1.

III. Act of bankruptcy: procuring own goods to be taken in execution.

1. When committed.

An act of bankruptcy under stat. 6 *G.* 4. *c.* 16. *s.* 3., by procuring the party's own goods to be taken in execution is not committed till the actual seizure.

And, upon such seizure, the commission of the act of bankruptcy is not carried back by relation to any earlier period. *Belcher* v. *Gummow*, 873.

2. Relation to, 873. *Antè*, 1.

IV. Act of bankruptcy: refusal to admit demand on summons.

What omission not a refusal.

Under stat. 5 & 6 *Vict. c.* 122., if a trader, summoned by his creditor under sect. 11, and being indebted to him in 149*l.* 4*s.*, signs an admission that he is indebted to such creditor in 149*l.*, and there is nothing to shew that the 4*s.* was intentionally omitted, such trader does not commit an act of bankruptcy if he omits to perform any thing required by sect. 13 or sect. 15 from parties refusing to admit debts on summons, or admitting them in part.

If the trader, having, on summons, given an admission according to stat. 5 & 6 *Vict. c.* 122., agrees with the creditor to deposit bills with him as a security, and submit to a Judge's order for payment of the debt by instalments, with which terms the creditor is satisfied, no act of bankruptcy is committed though more than fourteen days elapse between the filing of the admission and the day appointed for fulfilling the stipulated terms, provided the agreement itself be made within the fourteen days; for in such case the trader has compounded for the demand in due

time, to the satisfaction of the creditor, within the meaning of sect. 14. *Pendell* v. *Rhodes*, 114.

V. Act of bankruptcy: omission to pay or compound for debt admitted on summons.

Agreement for composition within fourteen days, 114. *Antè*, IV.

VI. Order and disposition: policies.

What notice to insurer of assignment of policy sufficient, 730. *Agent*, III.

VII. Relation.

To what period, 875. *Antè*, III. 1.

VIII. Certificate.

How shewn to be void for losses by gambling, 1024. *Post*, IX. 1.

IX. Discharge on certificate.

1. Jurisdiction of single Judge.

Under stat 5 & 6 *Vict. c.* 122. *s.* 42. this Court in banc has no jurisdiction to discharge a prisoner who has become bankrupt and is in execution under a judgment obtained before the confirmation of his certificate, the jurisdiction being given to a single Judge. But if a Judge has, on hearing, refused to discharge, this Court may be moved to rescind his order.

On such application to a Judge, he may receive, and decide upon affidavit, the objection that the certificate is void, under sect. 38, on account of losses by gambling, and, if he considers the gambling to be proved, should refuse the application. And he may receive evidence of several distinct cases of loss by gambling within sect. 38. *Wearing* v. *Smith*, 1024.

2. Jurisdiction of full Court, 1024. *Antè*, 1.

3. Objection of losses by gambling, 1024. *Antè*, 1.

BARON AND FEME.

I. Actions by.

1. Feme's liability to execution for costs.

Where husband and wife have judgment against them, for costs, in an action brought by them jointly, a ca. sa. for the costs against both is regular. And no action lies for suing out the writ and arresting the wife upon such ca. sa., though it appear upon the record that the party suing out and arresting knew of the coverture. So held, where the first action was for a libel on the wife. *Newton* v. *Boodle*, 948.

2. Meaning of the wife being the meritorious cause of action, 948. *Antè*, 1.

II. Settlement, parochial.

Maiden settlement, 626. *Poor*, XXV. 2.

BARRISTER.

Order for exclusive audience.

Justices in quarter sessions may in their discretion make an order that barristers, provided as many as four attend, shall have exclusive audience in their Court, though, until such order was made, no barristers have attended the Court except on special retainer, and the business of advocates has always been performed by attorneys only. *Ex parte Evans*, 279.

BASTARDY.

Bond.

Proper custody, 727. *Evidence*, II.

BELIEF.

Reasonable.

Of acting under statute, 1005. *Action*, VI. 1.

BENEFICE.

Nonresidence, 691. *Clergy*, II. 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Drawing: form.

1. In the name of a firm, 361. *Post*, XIII. 1.

2. Partly by initials, 427. *Post*, XIII. 2.

II. Drawing: alteration.

1. Alteration of foreign bill not presumed to have been made in *England*.

Declaration in assumpsit, alleged that plaintiff, in *France*, drew a bill, for a sum named, on defendant, which defendant accepted. Issues were joined: first, on a plea of nonacceptance; secondly, on a traverse of a plea alleging that plaintiff, after the acceptance, and without defendant's consent, changed the purport of the bill by altering the sum for which it was drawn.

On the trial it appeared that the bill had been originally drawn in *Paris* for a larger sum than that named, but that defendant had accepted for a smaller sum. In the body of the bill the sum originally named had been altered to that for which defendant had accepted; but it did not appear by whom, or at what time or place, the alteration had been made. No stamp was on the bill.

Held, that plaintiff was entitled to a verdict on both issues: the acceptance by defendant furnishing evidence that he assented to the insertion of the smaller sum; and it not being shewn that the alteration, even if made by the parties contrary to their original intention, was made in *England*, so as to render a stamp requisite. *Hamelin* v. *Bruck*, 306.

2. Alteration in furtherance of original intention, 306. *Antè*, 1.

III. Accommodation bill.

1. When it becomes a bill for value.

In an action by drawer against acceptor of a bill of exchange, a plea that defendant accepted merely for plaintiff's accommodation, and that plaintiff did not, at any time, give any value or consideration for the acceptance, fails, if it appear that, after the bill was accepted (as alleged) for accommodation, the plaintiff gave a cross acceptance and was obliged to pay the amount, and that the bill accepted by defendant was due and unpaid at the time of action brought. *Burdon* v. *Benton*, 843.

2. Whether value being given subsequently, the bill ceases to be an accommodation bill, 843. *Antè*, 1.

IV. Stamp.

1. What alteration does not require, 306. *Antè*, II. 1.

2. Where a note contains collateral statement.

T. made a note in the following terms. "On demand I promise to pay *H.*, or order, 500*l.*, for value received, with interest, at the rate" &c.; "and I have lodged with the said *H.* the counterpart leases, signed by *D.*," &c., "for ground let by me to them respectively, as a collateral security for the said 500*l.* and interest. 500*l.*"

Held, that this might be sued on as a promissory note, and read in evidence, though stamped as a note only. *Fancourt* v. *Thorne*, 312.

V. Acceptance.

1. For smaller sum, 306. *Antè*, II. 1.

2. A recognition of a previous alteration, 306. *Antè*, II. 1.

3. On terms of redelivery to drawer before due, 602. *Post*, XV. 2.

4. What is. *Regina* v. *Gompertz*, 841.

5. Obtaining by fraud, 824. *Conspiracy*, II. 1.

VI. Indorsement: form.

In the name of a firm, 361. *Post*, XIII. 1.

VII. Foreign.

Alteration of, 306. *Antè*, II. 1.

VIII. Discounting.

A good consideration, 396. *Bank of England*, I. 1.

IX. Presentment for payment: time.

As against drawer of cheque, 52. *Post*, XII.

X. Holder.

1. Distinction between a bonâ fide

holder and holder for value, 396. *Bank of England*, I. 1.

2. Indorsement to on terms, 602. *Post*, XV. 2.

XI. Notice of dishonour.

Immaterial misdescription.

In an action by indorsee against indorser of a bill of exchange payable at *The London Joint Stock Bank* in *London*, notice of dishonour was proved, describing the bill as payable at *The London and Westminster Bank*.

Held no ground of nonsuit, the notice being accurate in all other respects, and there being no proof that defendant had been misled. *Bromage* v. *Vaughan*, 608.

XII. Cheques: presentment for payment. At what time.

To an action by holder against drawer of a cheque, it is no answer that the cheque was not presented in reasonable time, unless, during the delay, the fund has been lost, as by failure of the banker. *Robinson* v. *Hawksford*, 52.

XIII. Pleading: declaration.

1. Name of drawer, when not a party to the suit.

Declaration, by indorsee against acceptor, described the bill as made by "certain persons under the name, style or firm of *James Chandler and Son*," and as indorsed to plaintiff by "the said *James Chandler and Son*." Held good, on special demurrer. *Smith* v. *Ball*, 361.

2. Name of drawer: omission to refer to description in bill.

A declaration stated that "one *J. C. Pawle*" made a bill of exchange directed to defendant, and thereby required defendant to pay "to the order of the said *J. C. Pawle*" &c.; and defendant "accepted the said bill;" and "the said *J. C. Pawle*" indorsed it to plaintiff; and that defendant did not pay.

Held bad on special demurrer, inasmuch as, since stat. 3 & 4 *W. 4. c.* 42. *s.* 12., as well as before, the full names of the parties to a bill must be given; unless they are stated in the count to be described there as in the bill. *Levy* v. *Webb*, 427.

XIV. Pleading: plea.

1. Payment to bonâ fide holder: what not equivalent, 396. *Bank of England*, I. 1.

2. That bill was indorsed on terms of redelivery to drawer before due, 602. *Post*, XV. 2.

XV. Pleading: replication.

1. De injuria, to plea of bill being accommodation bill held not for value.

To assumpsit by indorsee against acceptor of a bill, defendant pleaded: That the bill was accepted for the drawer's accommodation; that, although, at the time of action brought, plaintiff held the bill as the owner thereof, yet he did not hold it for any value; and that, except as in this plea aforesaid, there never was any value, consideration, purpose or reason for defendant's accepting the bill, or paying or agreeing to pay the amount to the drawer. Plaintiff replied De injuriâ: to which replication the defendant specially demurred. A Judge at chambers ordered the demurrer to be set aside as frivolous.

This Court, on motion to rescind the order, refused to interfere.

Semble, that the replication was good. *Laforest* v. *Wall*, 599.

2. De injuriâ, to plea that bill was indorsed on terms.

In an action by indorsee against acceptor, defendant pleaded that the bill was accepted for the accommodation of the drawer, and on the terms that, if he should negotiate it, the holder should deliver it to the drawer before or when it became due, to enable him to take it up; and that the holder should not retain it after it became due: averment that the drawer indorsed it to the plaintiff, who received it on those terms.

Replication, De injuria.

Held, on special demurrer, that the replication was correct, inasmuch as

the plea admitted that some interest in the bill was transferred to the plaintiff, and, therefore, did not amount to an argumentative denial of the indorsement, but only to an excuse for not paying the bill to the plaintiff, though admitted to be holder and primâ facie entitled to sue. *Robinson* v. *Little*, 602.

XVI. Pleading: demurrer.

Frivolous demurrer set aside, 599. *Antè*, XV. 1.

XVII. Evidence.

That plaintiff gave value, 843. *Antè*, III. 1.

XVIII. Criminal Law.

Conspiracy to defraud by procuring acceptance, 824. *Conspiracy*, II. 1.

BILL OF EXCEPTIONS.

By consent, after judgment on rule for new trial. *Willoughby* v. *Willoughby*, 925, 955.

BIRTH.

Settlement by, 626. *Poor*, XXV. 2.

BISHOP.

Consistorial Court, 691, *Clergy*, II. 1.

BOARD.

I. Of surveyors of highways, 1005. *Action*, VI. 1.

II. Of guardians. *Poor*.

BONA FIDES.

I. Bonâ fide belief, 1005. *Action*, VI. 1.

II. Of applicant, when to be shewn, 942. *Poor*, XI.

III. Payment to bonâ fide holder, 396. *Bank of England*, I. 1.

BOND.

I. Pleading.

1. How shewn that action is brought post diem.

Declaration in debt by husband and wife on a money bond given to the wife while sole, dated, to wit on 27th *September* &c. Breach, nonpayment to her while sole, or to plaintiffs or either of them since the marriage. Plea, craving oyer of the bond and condition, and setting out the condition, which was for payment to the wife (then sole), her executors, &c. or assigns, of 300*l.* with interest for the same on 29th *March* next ensuing the day of the date of the above-written bond; and averring that, from the time of making the bond and condition, defendant hath always in all things duly performed the condition &c.: verification. Replication: That defendant did not nor would pay the sum of 300*l.* with interest for the same on the day and in the manner limited and appointed by the condition, according to the true intent &c. thereof: verification.

Demurrer. 1. Because it is not sufficiently alleged in the replication that the day appointed for payment by the condition was past before action brought. 2. Because the replication informally concludes with a verification. 3. Because the replication is double assigning breaches by nonpayment of principal and nonpayment of interest. 4. Because it does not allege with certainty to whom the money was unpaid, nor whether the default was before or after the marriage.

A Judge, on summons, set aside the demurrer as frivolous; *March* 9th. In the next term, *April* 27th, the defendant moved to set aside the Judge's order.

Held that the demurrer, on points 1, 3 and 4, was frivolous. On point 2, *Quære* whether it was not well grounded.

But the Court refused to overrule the discretion of the Judge in making the order, the plea at all events being bad, and the defendant being late in his application. *Trix* v. *Thorne*, 282.

2. What is not duplicity: nonpayment of principal and interest, 282. *Antè*, 1.

3. When it is shewn to whom unpaid, 282. *Antè*, 1.

4. Time of default, how shewn, 282. *Antè*, 1.

5. Conclusion: verification when proper, 282. *Antè*, 1.

6. Frivolous demurrer, 282. *Antè*, 1.

7. Oyer: insertion at the head of the plea, 282. *Antè*, 1.

II. Particular instances.

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BOUNDARY.

Of reputed manor, 298. *Evidence*, VII.

BREACH.

I. To which the plaintiff has himself contributed, 713. *Charterparty*, I. 1.

II. Assignment of: conclusion, 282. *Bond*, I. 1.

BRITISH SUBJECT.

Who is, 806. *Shipping.*

BURTHEN OF PROOF.

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CANCELLATION.

Of letters patent, 523. *Patent*, II. 1.

CAPIAS.

I. Information to be given to party arrested, 60. *Arrest*, I. 1.

II. Ca. sa. *Execution*, III.

CAPTION.

Of examination, 65. *Poor*, XXVII. 2.

CASE.

I. Action on.

1. Action for keeping mischievous animals: gist of action.

A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is primâ facie liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities.

Quære, whether, to an action on the case for injury caused as above stated, it would be a defence that the injury was occasioned solely by the wilfulness of the plaintiff, after warning. *May* v. *Burdett*, 101.

2. For conspiracy on sale by auction, 1015. *Demurrer*, I. 3.

3. For deceit by fraudulent representation, 197. *Deceit*, I. 1.

4. For particular damage by public nuisance: where jury negative the damage, 991. *River*, I.

5. For injury to reversion by obstructing highway, 991. *River*, I.

II. Declaration.

When not necessary to allege negligence, 101. *Antè*, I. 1.

III. Plea.

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I. Generally.

1. Particularity in, 651. *Lunatic*, I. 1.

2. Variation from statutory form, 651. *Lunatic*, I. 1.

II. Game certificate, 155. *Conviction*, I. 1.

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I. When it lies: notwithstanding clause taking it away.

Where inquisition comprises matters beyond jurisdiction, 443. *Compensation*, II. 2.

II. How granted.

Absolute, in the first instance, by Judge at chambers, 32. *Poor*, XXIX. 1.

III. What indictments not removeable by.

For keeping disorderly house, 235. *Disorderly House*.

IV. Costs.

1. On shewing cause in first instance, 291. *Poor*, III.

2. Of prosecutor of indictment: party grieved, 302. *Costs*, I. 1.

V. In particular instances.

1. To remove inquisition assessing compensation, 443. *Compensation*, II. 2.

2. To remove depositions on which a conviction proceeded, 669. *Conviction*, IV.

3. As ancillary or in answer to a habeas corpus, 669. *Conviction*, IV.

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CHANCERY.

I. Case sent for trial into Q. B.

1. Proceedings, judgment, and execution, 523, 529 n. *Patent*.

2. Transmission of record or transcript, 523, 529 n. *Patent*.

II. Receiver appointed by.

General authority, 623. *Trespass*, I.

CHARGEABILITY.

Statement of in examinations, 626. *Poor*, XXV. 2.

CHARTERPARTY.

I. Loading.

1. What is loading within a reasonable time.

By charterparty, the freighters of a ship agreed with the owners that the ship, being fit for the voyage, should proceed to *Port T.*, and *there load a cargo; the ship to be loaded in turn;* certain working days to be allowed, and a further number of days for demurrage &c. The owners brought assumpsit on this agreement, alleging: 1. That, although the ship, being fit &c., sailed and arrived at *Port T.*, yet defendants did not, within a reasonable time after her arrival there, load a cargo &c.; 2. That defendants did not, at *Port T.*, load the ship in turn, but long after the proper and regular turn; whereby plaintiff was injured &c.

Pleas. 1. That defendants did *within a reasonable time* after the arrival &c., *load* the ship, &c. 2. That defendants did, at *Port T.*, *load the ship in turn.* 3. That plaintiff was master, and *had the care, direction and management* of the ship; and that, after the ship's arrival at *Port T.*, and before defendants could load &c., plaintiff, so being master &c., and the crew, took such bad care of the ship, and governed and navigated her so improperly, that the ship, by the carelessness, unskilfulness and mismanagement of the said master and crew, became damaged and unfit to receive a cargo, and so remained for a long time &c., by reason whereof defendants could not load &c. Replication, De injuriâ. Issues joined on all the pleas.

By a local act, regulating the port,

the master of every ship coming in was bound, under a penalty, to moor, anchor and place the same in such situation as the harbour-master should direct; and the harbour-master was authorised to cause the vessel to be removed in such manner as he should deem necessary. The ship's master was also bound to take on board a pilot, who, by the by-laws of the port, was to obey the orders of the harbour-master. It was proved, on the trial, that defendant's ship, with a pilot, arrived at the port, and received directions from the harbour-master as to entering; but the master and crew worked the ship in a manner contrary to his directions; and in consequence she received injury, lost her then turn of loading, and was unable to load till the expiration of some days, when she loaded without further delay. After verdict for defendants on all the issues,

Held, on motion for new trial, that, on the third issue, the Judge rightly directed the jury to find for defendants if they thought the accident was the fault of the master and crew, for: 1. The ship, though under the harbour-master's direction, was, for the purposes of this plea, under the care and management of the plaintiff. 2. The defendants might allege the delay, occasioned as above, in order to shew that they loaded in reasonable time, and in turn, within the meaning of the charterparty.

Held also, on motion to enter a verdict for plaintiff on the 1st and 2nd issues, that, on the facts above stated, defendants were right in pleading that they loaded in turn, and in reasonable time; and that they could not have pleaded in confession and avoidance. *Taylor* v. *Clay*, 713.

2. What is loading in turn, 713. *Antè*, 1.

II. Delay.

1. Caused by owner's misconduct, 713. *Antè*, I. 1.

2. Caused by misconduct of master and crew, 713. *Antè*, I. 1.

III. Pleading.

By traverse, or in confession and avoidance, 713. *Antè*, I. 1.

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I. Conspiracy, 824. *Conspiracy*, II. 1.

II. By fraudulent representations, 197. *Deceit*, I. 1.

III. False pretences. *False Pretences.*

CHEQUE.

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I. Ecclesiastical persons, 691. *Clergy*, II. 1.

II. Ecclesiastical Courts. *Ecclesiastical Court.*

III. Nonresidence, 691. *Clergy*, II. 1.

IV. Custom to contribute to repairs, 179. *Prohibition*, III.

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Custom to raise a definite proportion, 179. *Prohibition*, III.

CHURCHWARDEN.

Custom to contribute to their expenses, 179. *Prohibition*, III.

CLERGY.

I. Different descriptions of.

Rectors, 691. *Post*, II. 1.

II. Nonresidence: proceeding for penalties under stat. 1 & 2 *Vict. c.* 106.

1. Nature of the suit.

A proceeding in the Consistorial Court to recover penalties for nonresidence under stat. 1 & 2 *Vict. c.* 106. *ss.* 32. 114., is not a criminal suit within stat. 3 & 4 *Vict. c.* 86. *s.* 23., but a civil suit, and therefore is not to be instituted in the mode pointed out by sect. 3 of the latter act.

Semble, that an allegation, in such proceeding for penalties, that the party complained against was and is "rector of the rectory and parish church of *W.*" "rightly instituted and inducted" thereto, sufficiently implies that he had a cure of souls. At least an objection to its sufficiency will not be entertained on motion for a prohibition after sentence.

Where a sentence of the Consistorial Court, in such proceeding, condemned the party charged in payment of one third part of the annual value of his benefice, with the reasonable expense of the promoter of the suit; Held, on motion for a prohibition, that such sentence was valid, and consistent with stat. 1 & 2 *Vict. c.* 106. *s.* 10., though it went on to order that the amount of such third part and of such expense should "be ascertained in the usual and accustomed manner by the Registrar" of the Court: it appearing that the sentence was conformable to the practice of the Consistorial Court, and that by such practice, payment would not be enforced till the Bishop had received the Registrar's report of the amount, and made an order thereon. *Rackham* v. *Bluck*, 691.

2. Form of the proceeding, 691. *Antè*, 1.

3. What allegation shews cure of souls, 691. *Antè*, 1.

4. Condemnation in costs, 691. *Antè*, 1.

5. Form of sentence, 691. *Antè*, 1.

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Provisions for remedying defects, how applied, 669. *Conviction*, IV.

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Mandamus to issue warrant, refused, 976. *Conviction*, VIII. 1.

COMPANY.

First. Public companies.

I. Joint stock: registration act.

1. Act not applicable to railway companies.

Sect. 26 of the Joint Stock Companies' Registration Act, 7 & 8 *Vict. c.* 110., prohibiting the sale of shares before complete registration, does not apply to railway companies requiring an act of parliament, those companies being, in terms, exempted from the operation of the act by the first proviso of sect. 2, and not excepted out of that clause by any subsequent special provision.

A railway company is sufficiently brought within the enactment of that clause in pleading, if it be averred that the Company was established in *England* for the purpose of making and maintaining a certain railway, to be called &c., under the authority of an

act of parliament to be obtained for that purpose with the usual powers to take land for the purposes of the said railway, and to take tolls from persons using the said railway, and other powers and authorities usually granted by parliament to railway companies; and that the purposes of the said joint stock company and the said railway intended to be executed by them could not be carried into execution without first obtaining the authority of parliament in that behalf. So held on special demurrer.

It is not necessary, in such pleading, to aver that the Company was established for the *sole* purpose of making a railway. So held on special demurrer.

The Court, in construing such a plea, will take notice that the purposes of such a railway company, though not all specified in the pleading, require the authority of parliament for their being carried into execution.

Where the plea (to an action for the price of shares) sets up as a defence the want of complete registration before the transfer, it is enough if the replication aver that the Company is a company for executing a work which cannot be carried into execution without obtaining the authority of parliament, that is to say, a railway. So held on special demurrer.

The price of railway shares may be recovered under a declaration for "goods and chattels" sold and delivered. So held, on special demurrer, alleging that plaintiff had declared for the price of goods and chattels, whereas it appeared by the replication that he sued for the price of railway shares.

A plea, relying on the want of complete registration, does not describe the company so as to bring it within sects. 2 and 26, unless it deny that the company was a banking company &c., so as to negative the exception in sect. 2, though it be averred generally that the company required registration under the act. So held, on demurrer to the replication. *Lawton* v. *Hickman*, 563.

2. Pleading so as to bring company within the enactment, 563. *Antè*, 1.

3. Pleading, negative of exceptions, 563. *Antè*, 1.

II. Provisional committee: liability to actions.

1. When not for acts done after appointment of managing committee.

Defendant was, by his consent, a member of the provisional committee of a projected company. According to the prospectus, the affairs were to be under the control of a managing committee. A managing committee was appointed; and then the provisional committee ceased to act. After this, the solicitor to the Company, who had been appointed by the provisional committee, gave orders for the publication of advertisements. In an action against defendant for the expense of inserting these, it was proved that he had twice attended meetings of the provisional committee, but that he was not on the managing committee, nor a shareholder.

Held, that these facts constituted no evidence for a jury of the defendant having authorised the insertion of the advertisements, nor of his liability. *Cooke* v. *Tonkin*, 936.

2. Several actions against several defendants for same joint cause, 612. *Action*, IV. 2.

3. Proceedings when not stayed, 612. *Action*, IV. 2.

III. Managing committee.

Effect of appointment as regards provisional committee, 936. *Antè*, II. 1.

IV. Solicitor to the company.

Provisional committee when not liable for work ordered by him, 936. *Antè*, II. 1.

V. Compensation to landholders.

1. Mandamus to summon jury, 980. *Mandamus*, III.

2. Second application on same materials, 980. *Mandamus*, III.

VI. Comprising foreigners.

1. Ships owned by corporation comprising foreigners, 806. *Shipping*, I. 1.

VII. Insurance company, 730. *Agent*, III.

Secondly: Private companies. See *Partner*.

COMPENSATION.

I. Under municipal acts.

1. Who not an officer of a division of a county.

Stat. *5 & 6 Vict. c.* 111., confirming the charters of incorporation of certain boroughs, including *Manchester*, enacts (sect. 2) "that every officer of any such borough, or of any county or any division of a county in which any such borough is situated, who was in any office of profit at the time of the granting of any such charter," "whose office shall have been abolished, or who shall have been removed from his office, or who shall have been deprived of any part of the fees and emoluments of his office, in consequence of any such grant, shall be entitled to have an adequate compensation, to be assessed by the council and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, or for such part thereof as he shall have been so deprived of, regard being had to the manner of his appointment to the said office and his term or interest therein, and all other circumstances of the case;" and incorporates the provisions of stat. *5 & 6 W. 4. c.* 76. relating to the claim of any corporate officer for compensation.

A mandamus to the council of *Manchester* recited grants of a charter of incorporation, separate commission of the peace, and separate court of quarter sessions to that borough. That *M.* was an officer of the *Manchester* division of the county of *Lancaster*, in which division *Manchester* was situated; "that is to say, holding the several offices of clerk to the magistrates for the county of *Lancaster*, acting for the said division of *Manchester*, otherwise called clerk to the justices of the petty sessions held for the said division, and clerk to the justices for the time being, appointed under stat. *53 G. 3. c.* 72.," whose respective sittings were holden &c. in *Salford*: that these offices were offices of profit, and *M.* had enjoyed emoluments therefrom; and that he had been deprived of part of the emoluments in consequence of the grants, and had claimed and been refused compensation. The writ then commanded the council to assess compensation. Return: That *M.* was not an officer of a division of the county, and had not been deprived of emoluments, as alleged. Issues thereon.

On the trial, it appeared that a stipendiary magistrate had been appointed for *Manchester* under stat. *53 G. 3. c.* 72.; that, both before and after that appointment, the greater part of the business of petty sessions had been transacted at *Salford*, first, by some justices of the division, and, after the appointment of the stipendiary magistrate, by him together with some such justices; but some other business of petty sessions within the division was also transacted at two other places therein. *M.* had always acted as clerk to the magistrates and stipendiary magistrate at *Salford*, but not at the two other places; other persons having there acted as clerks. Loss of emolument in consequence of the grants was proved.

Held, that the traverses in the return were sustained. And, the Judge having left to the jury whether *M.* was a clerk to the justices of the division and to the stipendiary magistrate, and the jury having found in the affirmative, and a verdict having been entered for the Crown, a new trial was directed.

Quære, whether the offie of clerk to the justices at petty sessions be within either stat. *5 & 6 Vict. c.* 111. *s.* 2. or stat. *5 & 6 W. 4. c.* 76. *s.* 66. *Regina* v. *Manchester, Town Council*, 458.

2. What not a depriving of emoluments by grant of charter, 458. *Antè*, 1.

3. Office of clerk to justices at petty sessions, 458. *Antè*, 1.

II. Under public (local and personal) act.

1. To lord on change of tenure, 469. *Copyhold*, II. 1.

2. For injury to trade.

The *Hull* Dock Company's act (7 &

8 *Vict. c.* ciii.), giving them power to take certain lands, provided for the payment of purchase-money, and enabled the owners of lands, or interests therein, to accept compensation for any damage by them sustained by reason of the severing of such lands, or otherwise owing to the exercise of the powers of that act. Similar language as to compensation was used in other clauses. In default of agreement between the company and land-owners, the purchase-money and compensation were to be assessed by a jury, who, by sect. 117, were to deliver their verdict for the sum to be paid for purchase, and also the sum to be paid for the injury done to the lands of any such party by the severance of such lands from those required by the company; *and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works*, whether for damage sustained before the time of the inquiry, or for future damage, either temporary or permanent, or for any recurring damage &c.; and *the sums to be paid* for the injury done by any such severance as aforesaid, *or by way of compensation for any such damage as aforesaid*, were in every case to be assessed separately from the value of the lands &c., or the sum to be paid for the purchase thereof &c.

Held, that the words of sect. 117 were large enough to include compensation to a land-owner, parting with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on. And that a verdict awarding, first, a sum for purchase-money, and, secondly, a further sum as compensation for such loss, was warranted by the act.

Semble, that, if the latter part of the finding had been void for want of jurisdiction, the inquisition might have been removed by certiorari, though the act contained a clause taking away certiorari, and the verdict, as to the award of purchase-money, was good. *Jubb* v. *Hull Dock Company*, 443.

3. Mandamus to summon compensation jury, 980. *Mandamus*, III.

4. Second application on same materials, 980. *Mandamus*, III.

5. Certiorari to remove inquisition, 443. *Antè*, 2.

COMPLAINT.

Page 626. *Poor*, XXV.

COMPOSITION.

Within fourteen days under stat. 5 & 6 *Vict. c.* 122. *s.* 14., 114. *Bankrupt*, IV.

COMPOUNDING OFFENCES.

Illegal, 371. *Consideration*, I.

COMPROMISE.

Illegal, 371. *Consideration*, I.

CONCLUSION.

With a verification, 282. *Bond*, I. 1.

CONDITION.

I. Concurrent.

Pleading readiness, 164. *Pleading*, XX.

II. On sale of goods, 1030. *Vendors*, II. 1.

CONFESSION.

In pleading, 602. *Bills*, XV. 2. 858. *Attorney*, VI. 1.

CONSENT.

I. What compulsion prevents attendance on taxation from operating as consent, 744. *Attorney*, IX.

II. How far necessary to found a claim as on a contract, 744. *Attorney*, IX.

CONSIDERATION.

I. Illegality.

Compromise of an indictment.

In an action of assumpsit, it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a fi. fa. issued by plaintiff against the goods of one of the persons indicted. Defendants (being third parties), in consideration that plaintiff would, at their request, not further prosecute, promised to pay the balance in the original action remaining unsatisfied; and likewise the costs of the prosecution. Plaintiff, in consideration thereof, with the assent of the Judge before whom the prosecution was, at the assizes, forbore to prosecute further.

On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:

Held, by the Court of Exchequer Chamber, affirming the judgment of Q. B.,

That the consideration was unlawful, and that no action could be maintained on any of the promises. *Keir* v. *Leeman*, 371.

II. Continuing.

1. Agreement to stay proceedings.

Declaration, in assumpsit, stated that *T.* had commenced an action against *M.* for 165*l.*; and that, in consideration of *T.*'s "agreeing to stay the said action," defendant promised to pay *T.* the 165*l.* within six months next after the decease of *A.*

The promise, as proved, was, to pay, as above, in consideration of *T.*'s "having agreed" to stay the action.

Held no variance; and that a valid consideration was proved. *Tanner* v. *Moore*, 1.

2. Continuing, 396, 407. *Bank of England*, I. 1.

III. Past.

Having agreed to stay proceedings, 1. *Antè*, II. 1.

IV. Variance.

What is not, 1. *Antè*, II. 1.

CONSISTORIAL COURT.

I. Proceedings in, to recover penalties, 691. *Clergy*, II.

II. Condemnation in costs, 691. *Clergy*, II.

CONSOLIDATION.

Of actions.

I. Judgment nunc pro tunc, 47. *Death.*

II. When refused, 612. *Action*, IV. 2.

CONSPIRACY.

I. Substance and nature of the offence.

1. Total failure immaterial, 824. *Post*, II. 1.

2. To misrepresent the quality of goods sold by auction, 1015. *Demurrer*, I. 3.

II. Indictment.

1. General count.

A count in an indictment is good which simply charges that defendants, unlawfully, &c., did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud *R.* of his moneys.

Where an indictment for conspiracy contains several counts, if only a single conspiracy be proved, the verdict may nevertheless be taken on so many of the counts as describe the conspiracy consistently with the proof.

In the course of proving a conspiracy to defraud, carried into effect by prevailing upon the prosecutor to accept bills, a warrant of attorney, given to him for the purpose of inducing him to accept, reciting the ac-

ceptance, may be given in evidence, though unstamped.

An indictment for conspiring to defraud the prosecutor may be supported by proof of a conspiracy to obtain his acceptances, though the prosecutor part with no money, and though he never has intended to take up the acceptances, and though the bills were never in his hands except for the purpose of his accepting.

Where all of several defendants in an indictment for conspiracy are found Guilty, if one of them shew himself entitled to a new trial on grounds not affecting the others, the new trial will nevertheless be granted as to all. *Regina* v. *Gompertz*, 824.

2. Several counts, 824. *Antè*, 1.

III. Evidence.

1. Unstamped instrument, 824. *Antè*, II. 1.

2. Total failure of the conspiracy, 824. *Antè*, II. 1.

IV. Verdict.

On how many counts, 824. *Antè*, II. 1.

V. New trial.

Several defendants, 824. *Antè*, II. 1.

CONSTABLE.

Police.

Slander in respect of office, 7. *Defamation.*

CONSTRUCTION.

I. Generally.

1. Ut res magis valeat quam pereat, 1053. *Landlord and Tenant*, I. 3.

II. Of statutes.

1. Literal, 235. *Disorderly House.*

2. Of powers given by words of reference, 291. *Poor*, III.

3. Redendo singula singulis, 291. *Poor*, III.

4. Same word with different meanings in same section, 328, 356. *Devise*, I.

5. Retrospective, 328, 358. *Devise*, I. 847, 858. *Attorney*, VI.

6. By supplying words, 443, 455. *Compensation*, II. 2.

7. By virtual incorporation, 443, 456. *Compensation*. II. 2.

8. To meet substantial justice, 443, 456. *Compensation*, II. 2.

9. By reference to title of act, 469, 516. *Copyhold*, II. 1.

10. Not by smallness of evil to be remedied, 469, 514. *Copyhold*, II. 1.

11. Directory, 651. *Lunatic*, I. 1.

12. With reference to previous course of legislation, 691, 711. *Clergy*, II. 1.

13. Peremptory, notwithstanding an impossibility, 923. *Arbitration*, V. 1.

14. So as to reserve a discretion, 942 *Poor*, XI.

III. Of pleadings.

1. By reference to the whole record, 282. *Bond*, I. 1.

2. What the Court will notice, 563. *Company*, I. 1.

3. In Ecclesiastical Court, after sentence, 691. *Clergy*, II. 1

4. After pleading over, in the sense that would make it a good answer, 759. *Judgment*. IV. 1.

IV. Of wills.

1. Control of general rule by particular words of limitation, 328. *Devise*, I.

2. The Court must be in the same condition as the devisor with respect to knowledge, 328, 347. *Devise*, I.

V. Particular words and phrases.

1. "Absent himself from his said service," 80. *Conviction*, I. 2.

2. "Having agreed," when equivalent to "agreeing," 1. *Consideration*, II. 1.

3. "And also," 209. *Covenant*, I. 1.

4. "Any," not same as *any such*, 235. *Disorderly House.*

5. "At any time," 886. *Poor*, XXXIII. 3.

6. "Authorised and empowered within six calendar months," 923. *Arbitration*, V. 1.

7. "Direction, care, and management," 713. *Charterparty*, I. 1.

8. "Compensation," 443, 456. *Compensation*, II. 2.

9. "Compounding," 114. *Bankrupt*, IV.

10. "Damage," 443. *Compensation*, II. 2.

11. "Shall have delivered," 847, 856. *Attorney*, VI. 2.

12. "During which time," 663. *Poor*, XIX. 1.

13. "Expressly," 291. *Poor*, III.

14. "Forfeit," 469. *Copyhold*, II. 1.

15. "Forthwith," 684. *Time*, I. 1.

16. "From the day and year aforesaid," when inclusive, 137. *Contract*, XVIII. 1.

17. "Goods and chattels," 563. *Company*, I. 1.

18. "Judge of the Court wherein judgment has been so obtained," 1024. *Bankrupt*, IX. 1.

19. "Justices having jurisdiction within and for" not equivalent to "justices in and for" 32. *Poor*, XXIX. 1.

20. "Levy," 223. *Execution*, II. 1.

21. "In like manner in all respects," 291. *Poor*, III.

22. "Male heirs of *W.*, if any such there be," 528. *Devise*, I.

23. "Not on the merits," 878. *Poor*, XXXIII. 1.

24. "No notice," equivalent to "no reasonable notice," 41. *Poor*, XXXVI. 2.

25. "Or," 626, 636. *Poor*, XXV. 2.

26. "Overseers," 626. *Poor*, XXV. 2.

27. "Plea," 1015, 1023. *Demurrer*, I. 3.

28. "Any thing done in pursuance of or under the authority of this act," 1005. *Action*, VI. 1.

29. "Reasonable time," 713. *Charterparty*, I. 1.

30. "Rector of the rectory and parish church," 691. *Clergy*, II. 1.

31. "Before the removal of such goods," 229. *Execution*, II. 1.

32. "Rent," 328, 356. *Devise*, I.

33. "Liable to be *taken*," 223. *Execution*, II. 1.

34. "Then," 271. *False Pretences*, I. 1.

35. Occupation "at the same time," *Regina* v. *Henley*, 666 n.

36. "Turn," 713. *Charterparty*, I. 1.

37. "Upon" the plaintiff doing certain acts, 164. *Pleading*, XX.

38. "Within ten miles thereof," 76. *Poor*, XVIII.

CONTINUANCE.

Of obstruction, 991. *River*, I.

CONTINUING ESTATE.

Allegation of continuing tenancy, when necessary, 14. *Distress*, I.

CONTRACT.

I. Instrument.

Collateral memorandum reciting an agreement which exists in a formal shape, 779. *Post*, IX. 1.

II. Stamp.

What memoranda do not require stamp, 779. *Post*, IX. 1.

III. When inferred or not.

Contract for pasture feeding, when not inferred from the feeding so in fact, 971. *Poor*, XVII. 2.

IV. Consent of parties.

Not inferred from taking part under compulsion of Judge's order made without consent, 744. *Attorney*, IX.

V. What does not amount to.

Collateral statement in a promissory note, 312. *Bills*, IV. 2.

VI. Consideration.

1. Discounting of promissory note, 396. *Bank of England*, I. 1.

2. Illegal compromise, 571. *Consideration*, I.

VII. Conditional or absolute.

1. Sale, subject to power to resell on nonpayment, 1030. *Vendors*, II. 1.

2. Concurrent condition, 164. *Pleading*, XX.

VIII. Continuing.

What is a continuing agreement, 1. *Consideration*, II. 1.

2. What employment not under a continuous contract, 744. *Attorney*, IX.

IX. Time, when of the essence.

1. Valuation fixed for a day certain.

In assumpsit on a promissory note made by defendant and payable to plaintiff, defendant, as to all but 3*l.* 5*s.*, pleaded that, to wit on 30th *March*, *C.* being then tenant to *M.* of a farm, and having arranged to transfer it to defendants, and being, jointly with plaintiff, entitled to the farming stock and growing crops, it was agreed, by plaintiff and *C.* of one part, and defendant of the other, that, in consideration &c., *C.* and plaintiff had sold, and thereby ratified, to defendants the possession of the farm, possession to be given on execution of the agreement: and, for the considerations aforesaid, and of such sum as should be found by valuers, after named, to be the value of the way-going crop of corn having been secured to be paid by defendants to *C.*, and plaintiff on 1st *September* next, after deducting the rent which would become due to *M.* in *April*, *C.* and plaintiff thereby sold to defendants the way-going crop and tenant-right: and the parties nominated valuers, *T.* and K.: and it was agreed that the *April* rent should be deducted from the valuation, and the remainder secured to be paid to *C.* and plaintiff on 1st *September* next. Averment, that, to wit on 1st *April*, the parties further agreed that the valuation should be made immediately and the amount secured by a promissory note, but the valuation should be revised by the valuers, *to wit on* 1st August *then next*, and, if any alteration should be made, the parties should pay and receive the amount so to be ascertained. Averment that the valuers, to wit on 1st *April*, valued at 94*l.* 10*s.*, and the promissory note was given, payable 1st *September*, for the difference between that sum and the rent, and there was no other consideration for it. That afterwards, *to wit* 2d *August*, the valuers revised the valuation and reduced it to 56*l.* 15*s.*, whereby the difference between the rent and the valuation was reduced to 3*l.* 5*s.*, and the consideration for the note failed as to the residue. Replication: De injuriâ.

On the trial, it appeared that the words of the agreement of 1st *April* were: "that such valuation shall be revised and examined by the said valuers above named on the 1st day of *August* next." The crops were in fact viewed on 2d *August* only: the value was finally fixed on 12th *August:* but it was proved that the value had not altered between 1st and 2nd *August*.

Held, that the revision was not made in pursuance of the agreement, and that the plaintiff was entitled to a verdict on the issue.

To prove that plaintiff had assented to the revision on 2d *August*, defendant offered in evidence an unstamped memorandum, signed by plaintiff on 20th *August*, when defendant's attorney, with whom the note had been deposited, gave it up to plaintiff. The memorandum stated the amount of the first valuation, the balance, after deducting the rent, and that this was secured by the note; and added: "this note is to be subject to the revised valuation of Messrs. *T.* and *K.*, and

will be more or less than 41*l.* 0*s.* 8*d.* accordingly as they value the corn. *N. B.* The note was given up to me by *W.* this 20th *August.*"

Held that this did not require a stamp, and ought to have been received as evidence. *Marshall* v. *Powell*, 779.

2. Evidence of enlargement, 779. *Antè*, 1.

X. When binding at all events, 779. *Antè*, X. 1.

XI. Illegal.

1. Gambling: subscription for *Derby* lottery, 431. *Gambling*, I. 1.

2. To compound misdemeanor, 371. *Consideration*, I.

XII. Annulling.

By resale, 1030, *Vendors*, II. 1.

XIII. Privity of, 209. *Covenant*, I. 1.

XIV. Breach.

To which the plaintiff himself contributes, 713. *Charterparty*, I. 1.

XV. Performance.

Liability to perform at all events, 713. *Charterparty*, I. 1.

XVI. Merger.

In judgment, 759. *Judgment*, IV. 1.

XVII. Pleading: declaration.

1. Allegation of time: "from" when inclusive.

Declaration alleged that, to wit on 15th *October*, in consideration that plaintiff, at defendant's request, would enter defendant's service, and serve him for a certain time, to wit *from* the day and year aforesaid, to wit till the service should be determined, to wit by reasonable notice in that behalf on either side, for a salary named, defendant promised plaintiff to retain and employ him on the terms aforesaid, and pay him such salary, and continue him in such service until such service should be determined as aforesaid, to wit by reasonable notice (as before): that plaintiff, *to wit on the day and year aforesaid*, entered the service of defendant on the terms aforesaid, and had always, from the commencement thereof hitherto, been ready and willing to remain and continue in the service &c., and during all that time tendered and offered himself to serve defendant in such service &c., of all which defendant during all that time had notice: yet defendant did not nor could continue plaintiff in his said service, but, on the contrary thereof, to wit *on the same day and year aforesaid*, refused to suffer plaintiff to continue any longer in the said service, and discharged plaintiff therefrom, without any previous notice in that behalf, and without any reasonable or probable cause in that behalf, and had, thence hitherto, refused any longer to retain plaintiff in his said service.

On special demurrer, Held:

(1.) That the word *from* was, on this record, to be taken as including the 15th *October* within the time of service contracted for; and it could not therefore be objected that defendant appeared to have discharged plaintiff from the service before its commencement.

(2.) That the declaration was not double for averring plaintiff's willingness to serve as well as his tender; and that issue might have been taken on the tender alone.

(3.) That the declaration was not bad for want of an allegation that plaintiff had given no notice to determine the service, there being an averment that he always was willing to serve and continually tendered himself to do so, of which defendant had notice. *Wilkinson* v. *Gaston*, 137.

2. Duplicity: averment of willingness as well as tender, 137. *Antè*, 1.

3. Essential negative: implied by affirmative inconsistent with contrary supposition, 137. *Antè*, 1.

4. Inserting common count with count on special contract, 986. *Declaration*, II.

XVIII. Pleading: plea.

1. What issue may be taken on averment of willingness and tender, 137. *Antè*, XVII. 1.

2. Plea, discharge by agreement and performance; the agreement is traversable, 819. *Accord.*

XIX. Enforcement by summary conviction.

1. With what particularity it must be set out, 80. *Conviction*, I. 2.

2. What defences must be negatived, 80. *Conviction*, I. 2.

3. Whether unreasonableness is a defence, 80. *Conviction*, I. 2.

4. See also 92. *Conviction*, V.

XX. Particular agreements.

1. To stay proceedings in an action, 1. *Consideration*, II. 1.

2. Agreement to compound debt, under stat. *5 & 6 Vict. c.* 122. *s.* 14, 114. *Bankrupt*, IV.

CONVEYANCE.

Statutory.

What interest it passes, 469. *Copyhold*, II. 1.

CONVICTION, SUMMARY.

I. Information.

1. Before what number of justices.

The provision in the General Conviction act, *3 G. 4. c. 23. s. 2*, that, in all cases where two or more justices, deputy lieutenants or others, are authorised to hear and determine any complaint, one justice &c. shall be competent to receive the original information, does not repeal provisions of former statutes, expressly requiring more than one justice, &c., to receive an information. Therefore, a conviction on an information laid before a single commissioner of assessed taxes (not being a justice), under stat. *52 G. 3. c.* 93. Sched. (L.) Rule 13., is bad. *Regina* v. *Griffin*, 155.

2. When it does not shew an offence though it follows the words of the statute.

A return to a habeas corpus ad subjiciendum set forth a document, being a conviction and committal under stat. *4 G. 4. c. 34. s. 3.*, which recited an information and complaint, by the agent of *D.*, that the prisoner had contracted to serve *D.* for a term, and did, before the contract was completed, "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute" &c.: and the document added: therefore, "it manifestly appearing to me" (the justice) that the prisoner "is guilty of the said offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid: and I do hereby order and adjudge that" the prisoner, "for the offence aforesaid, be imprisoned" &c.

Held, that the information shewed no offence, as there might be some lawful excuse for the absence, though the statute simply makes the party's absenting himself from service the ground of complaint; and that the conviction was therefore bad. Prisoner discharged. *In re Turner*, 80.

3. Inferential charge not sufficient, 80, 90. *Antè*, 2.

4. When it must negative lawful excuse, 80. *Antè*, 2.

5. With what particularity it ought to shew nature of contract broken; *Arg.* 86. *Antè*, 2.

6. Description of the statutory offence: where act indifferent in its own nature is made criminal by statute, 669. *Post*, IV.

II. Proceedings to conviction.

1. Unreasonable detainer does not effect jurisdiction to convict, 669. *Post*, IV.

2. Depositions, when to be removed by certiorari, and by whom, 669. *Post*, IV.

III. Adjudication.

Of imprisonment: must be formal, 92. *Post*, V.

IV. Form: what must and what need not be negatived.

Exemptions in a different section of the act.

The Smuggling act, 8 & 9 *Vict. c.* 87. *s.* 2., enacts that any vessels therein described, which shall be found to have been within certain distances respectively of the coast of the United Kingdom, &c., having on board tobacco not being in a cask &c. containing 300 lbs. weight, &c., or any tobacco stalks, or other articles specified, shall be forfeited.

Sect. 4 enacts that nothing in the act contained shall render any vessel of 120 tons burden liable to forfeiture on account of any tobacco coming from certain specified places in packages of certain weights respectively, nor to render any vessel of 60 tons burden liable on account of other articles mentioned in sect. 2, under circumstances which are severally stated in this clause.

Sect. 50 enacts that every subject of Her Majesty who shall be found to have been on board any vessel liable to forfeiture under this act for being found to have been within certain distances mentioned in this act, having on board, or having had on board, such goods as subject the vessel to forfeiture, and every person not being a subject &c., who shall be found to have been on board any vessel liable to forfeiture for any of the causes last mentioned within one league of the coast of the United Kingdom, "shall, upon being duly convicted of any of the said offences before any two justices of the peace, be adjudged by such justices" to be imprisoned &c. Proviso, that any person proving to the satisfaction of any justice or justices before whom he may be brought that he was only a passenger, and had no interest in the vessel or any goods on board, shall be discharged.

Held by *Coleridge* and *Erle* Js., Lord *Denman* C. J. dubitante, that, in a conviction, under sect. 50, for being found in a vessel liable to forfeiture under sect. 2, as having on board prohibited goods, it was unnecessary to negative the exemptions in sect. 4.

Semble, per Lord *Denman* C. J., that, where a statute imposes penalties for an act indifferent in its own nature, and which, by the statute itself, is not an offence if done under circumstances there specified, the informer must shew it to be criminal, and for that purpose negative the circumstances under which (whether they be embodied in the penal clause or not) criminality does not attach.

By sect. 103, every warrant of commitment under this or any act relating to the customs shall be deemed valid, if it set forth an offence in the words of the act; and no such warrant shall be held void for any defect therein, if it allege a conviction of such offence, and if it appear to the Court before which the warrant is returned that the conviction proceeded on good and valid grounds. *Semble*, that, if, on return of such warrant to a habeas corpus, the grounds of conviction are relied upon in answer to an allegation of defect in the warrant, it lies upon the party supporting the conviction to prove those grounds, and that, to do this, he must bring up the depositions by certiorari.

Sect. 58 enacts (for the purpose of giving time to prepare informations, convictions, &c.) that, when any person shall have been detained by an officer (empowered by sect. 50) for any offence against this or any other act relating to the customs, and shall have been taken before a justice, if it appear to such justice that there is cause to detain, he is thereby authorised and required to order such person to be detained a reasonable time, and, at the expiration of such time, to be brought before any two justices, who are thereby authorised and required finally to hear and determine the matter. Held, that, although the justice detains the party for an unreasonable time, and he is then brought before two justices and convicted, the conviction is still valid, the jurisdiction to convict depending on sect. 50, and not being affected by the improper proceeding under sect. 58. *Van Boven's case*, 669.

V. Form: setting out evidence.

Conviction and commitment in one document.

A return by the keeper of a house of correction to a habeas corpus ad

subjiciendum stated that the prisoner was in custody under a commitment, the tenor of which was as follows. A document was then set out, addressed to all constables &c. and to the keeper, reciting that complaint had been made to a justice, on oath, that the prisoner had contracted to serve the complainant, and had absented himself from the service without his master's consent, before the contract was completed, contrary to the form of the statute &c.; that the complainant was "on this said 14th day of *November*" brought before the said justice and another justice to answer the complaint: "whereupon we, the said justices, in pursuance of the statute" &c., "did then and there duly examine the proofs and allegations of both parties, touching the matter of the said complaint, they having come before us for that purpose, and, upon due consideration had thereof, have, on the oath of the said" (complainant), "taken in the presence and hearing of the said" (prisoner), "adjudged and determined, and do hereby adjudge and determine, the said complaint to be true: and we do therefore convict the said" (prisoner) "of the said offence, in pursuance of the statute" &c. The document then commanded the constables to take the prisoner to the house of correction, and deliver him to the keeper, "together with this warrant;" and the keeper was required to receive him, to remain and be held to hard labour for the space &c.: "and for so doing this shall be your sufficient warrant." Given under the hands and seals of the justices, 14th *November*.

Held, no other document being before the Court, that this must be taken to have the double character of a conviction and commitment, under stat. 4 *G.* 4. *c.* 34. *s.* 3; and that, as it did not set out the evidence (and, per *Patteson* and *Williams* Js., as it did not in form adjudge any imprisonment), it was bad in the character of a conviction. Prisoner discharged. *John Hammond's case*, 92.

VI. Form: provisions for remedying defect.

How applied, 669. *Antè*, IV.

VII. Bad: for what defects.

1. Because the information set forth does not shew any offence, 80. *Antè*, I. 2.

2. Information laid before too few justices, 155. *Antè*, I. 1.

3. Not setting out evidence, 92. *Antè*, V.

4. Not containing formal adjudication of punishment, 92. *Antè*, V.

VIII. Commitment.

1. Mandamus to issue warrant refused.

A party convicted in a penalty, under a statute awarding imprisonment if the penalty were not paid, refused to pay, and threatened to proceed against the justices under the habeas corpus act, 31 *Car. c.* 2. *s.* 6., if they committed him, alleging that he had before been committed under conviction for the same offence, and discharged on habeas corpus. The justices then refused to commit, but stated their willingness to enforce the penalty if directed to do so by this Court. On motion for a mandamus to the justices to issue a warrant of commitment,

This Court, in the exercise of its discretion, refused to interfere, though it was suggested that the former discharge had been for a defect in the warrant of commitment. *In re Williams*, 976.

2. Provisions for remedying defect in warrant by shewing that the conviction proceeded on valid grounds, 669. *Antè*, IV.

IX. Remedies.

Habeas corpus, 669. *Antè*, IV.

X. In particular instances.

1. Under Smuggling Act, 669. *Antè*, IV.

2. Of servant for absenting himself from service, 80. *Antè*, I. 2.

COPYHOLD.

I. Lord.

His right to compensation on statutory change of tenure, 469. *Post*, II. 1.

II. Seizure quousque.

1. On default by infant.

Stat. 11 *G.* 4. & 1 *W.* 4. *c.* 65. *s.* 9., enacting that no infant shall *forfeit* copyhold land for his neglect or refusal to be admitted, does not prevent the lord from seizing *quousque*.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

A canal company was authorized by statute (33 *G.* 3. *c.* 80.) to purchase land, on voluntary or compulsory sale by the persons interested (at prices to be agreed upon, or ascertained by commissioners or a jury); and a form of conveyance was prescribed, purporting that the party granted all his "right, title and interest, to and in the same, and every part thereof, to hold to the said Company for ever." The Company were authorized to enter upon payment of price, or tender, &c.; and were made liable to render compensation for damage done by their works, &c., if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the Company, who paid him the price, and entered.

Held, by the Court of Exchequer Chamber,

That this conveyance passed only such interest as the copyholder could convey without the lord, and that, on the copyholder's death, no other person having been admitted, the lord might seize quousque for want of a tenant, and maintain ejectment, and an action for mesne profits, against the Company.

That, the copyholder having devised generally his property called *F.*, which comprehended the land in question, subject to payment of his debts, and other payments, the legal title to the land in question did not pass to the devisee, but descended to the copyholder's heir at law.

That, in an action by the lord against the Company for mesne profits, it appearing by special verdict that the steward had made a warrant of seizure, commanding the bailiff, generally, "to seize" the land "into the hands of the lord of the manor," and the bailiff did, in pursuance of the warrant, seize into the hands of the lord until a tenant should come in and be admitted, this must be considered only a seizure quousque.

That, in order to entitle the lord so to seize, there ought to be proclamations at three consecutive courts baron. But that, when, in an action by the lord in his own name for mesne profits, a special verdict found a custom to seize after three consecutive courts baron, and that there had been a recovery in ejectment on the lord's demise, (which recovery was not put on the record by way of estoppel), and that proclamation had been made in three courts, but it was not found whether they were, or were not consecutive, it must be considered that the proclamations were regular, though the jury would have been at liberty to find the contrary. *Dimes* v. *Grand Junction Canal Company*, 469.

2. What proceeding to be considered as such, 469. *Antè*, 1.

3. Proclamations, 469. *Antè*, 1.

4. Without warrant or under one that is too extensive, 469, 517. *Antè*, 1.

III. Conveyance.

In fee, in a statutory form, what it passes, 469. *Antè*, II. 1.

IV. Devise.

What does not pass legal title, 469. *Antè*, II. 1.

V. Infant heir.

Seizure quousque, 469. *Antè*, II. 1.

VI. Forfeiture.

Distinction between forfeiture and liability to seizure quousque, 469. *Antè*, II. 1.

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Of designs, 197. *Deceit*, I. 1.

CORNRENT.

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CORPORATION.

I. Nature and incidents.

1. Distinction between corporation and individual members, 806, 817. *Shipping*, I. 1.

2. *British* corporation a *British* subject, though it comprises foreigners, 806. *Shipping*, I. 1.

II. Property.

Ship owned by, 806. *Shipping*, I. 1.

III. Liabilities: indictment.

A corporation aggregate may be indicted for a misfeasance.

As, an incorporated railway company, for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred on the Company by act of Parliament. *Regina* v. *Great North of England Railway Company*, 315.

COSTS.

I. On prosecution by indictment: after removal by certiorari.

1. Prosecutor's costs which have been paid by subscription.

Where an indictment is prosecuted by persons having some interest in the subject-matter, and is removed by certiorari, the prosecutors, on conviction, are entitled to costs under stat. 5 & 6 *W.* & *M.* *c.* 11. *s.* 3., as parties grieved, though the expenses of prosecution have been paid by other persons.

An attachment for not paying such costs may be obtained against one of several defendants, on affidavit of demand upon and nonpayment by him. If his codefendants have paid, it is for him to shew it on motion to set aside the attachment.

It is not an objection available on such motion, that the rule to tax was obtained as against all the defendants, and that the rule for an attachment is entitled as in a prosecution against all. *Regina* v. *Dobson*, 302.

2. Who are parties aggrieved, 302. *Antè*, 1.

3. Attachment against one of several co-defendants, 302. *Antè*, 1.

4. Title of rule for attachment, 302, *Antè*, 1.

II. On rules and other proceedings.

1. Against unsuccessful party on rule for mandamus, 37, 41. *Poor*, XXXVI.

2. To Poor Law Commissioners on shewing cause in first instance, 291. *Poor*, III.

3. On habeas corpus ad subjiciendum: no power to give costs of shewing cause. *Shuttleworth's Case*, 663.

III. In ecclesiastical courts.

Form of condemnation, 691. *Clergy*, II. 1.

IV. Against pauper.

For not proceeding to trial, 978. *Pauper*, I.

V. Generally.

By whom to be ascertained, 691. *Clergy*, II. 1.

VI. Payment how enforced: attachment.

1. Against one of several codefendants, 302. *Antè*, I, 1.

2. Title of rule, 302. *Antè*, I. 1.

VII. Payment how enforced: ca. sa.

Against husband and wife, 948. *Baron and Feme*, I. 1.

COSTS OF THE DAY.

Pauper when ordered to pay, 978. *Pauper*, I.

COUNSEL.

I. Mistake of, 984. *Mandamus*, III.

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COUNT.

I. Several counts in indictment, 824. *Conspiracy*, II. 1.

II. In declaration. *Declaration*.

COUNTY.

I. Division of: sessional.

1. What clerk to justices is not an officer of, 458. *Compensation*, I. 1.

2. Petty sessions, 458. *Compensation*, I. 1.

II. Division of, for the purpose of holding assizes.

Effect as to local actions, 978. *Pauper*, I.

III. Liability for maintenance of pauper lunatic.

How not enforced, 159. *Poor*, XXXVII. 1.

COUNTY RATE.

I. What kind of tax.

Parochial, 261. *Post*, II.

II. Exemption clauses: public companies.

In same proportion as private lands.

Stat. 34 *G.* 3. *c.* 24. enacted that a canal Company should be rated to all parliamentary and parochial taxes and assessments for its lands and buildings, in the same proportion as other lands and buildings lying near should be rated, and as the lands and buildings of the Company would be rateable if they were the property of individuals in their natural capacity.

Held that *A.*, a parish in *Buckinghamshire*, was to be assessed to the county rate on an estimate in which the Company's lands and buildings were assessed as directed by the statute. For that,

Under stat. 12 *G.* 2. *c.* 29., the county rate was to be paid out of the poor rate of the several parishes, and was therefore a parochial tax.

And that this was not altered by stat. 55 *G.* 3. *c.* 51., stat. 56 *G.* 3. *c.* 49., or stat. 7 & 8 *Vict. c.* 33.

Nor by stat. 54 *G.* 3. *c.* ciii. (local and personal public), which enacts that the Justices of *Buckinghamshire*, in quarter sessions, shall assess to the county rate of *Buckinghamshire* every parish, township, hamlet, liberty, precinct and place in the county, rateably, and in due proportions, according to the annual rent or value of all estates within such parish, township, &c. respectively; and which requires returns to be made to the Justices (when they deem it necessary) of the total amount of such rent or value by the churchwardens and overseers of the several parishes, townships, &c., and makes provision for the case of any parish, township, &c., where no poor rate is laid, and for cases where it may be oppressive to parishes, townships, &c., that the county rate should be paid out of the poor rate. *Regina* v. *Aylesbury with Walton*, 261.

III. *Buckingham* county rate act, 261. *Antè*, II.

COURT.

I. In banc.

Jurisdiction with respect to discharge of bankrupt on his certificate, 1024. *Bankrupt*, IX. 1.

II. Consistorial, 691. *Clergy*, II. 1.

III. Inferior. *Inferior Court.*

IV. Court Baron and Court Leet. *Manor.*

COVENANT.

I. Joint or several.

1. Where one covenantee has no legal interest, and the others have separate legal interests.

B., being owner of land for a term of sixty-one years, granted to *S.* an annuity for lives, and, for securing it, assigned the term, wanting one day, to *R.* By indenture, reciting the above facts, *R.*, at the request of *S.* and *B.*, did demise and lease, and *B.* did grant, demise, lease, ratify and confirm to *O.* the land for thirty one years (ending some years before the term first mentioned), at a rent payable to *S.* while the land should remain subject to the annuity, and afterwards to *B.* And *O.*, for herself, her heirs, executors and

administrators, covenanted to and with *S.* and *R.*, and their respective executors, administrators and assigns, and also to and with *B.*, his executors, administrators and assigns, that she, *O.*, her executors, administrators and assigns, would pay the rent to *R.*, while the premises should remain subject to the annuity, and afterwards to *B.*; and that she, her executors, administrators or assigns, would perform certain repairs, and would surrender at the end of the thirty one years to *B.* in good repair; and *B.* (alone) covenanted for quiet enjoyment. There was also a covenant, by *O.*, with *R.* and *B.*, to repair after certain notice.

Held that, after the death of *S.*, *B.* and *R.* might join in an action against the assignee of *O.* for breach of the first mentioned covenant to repair, the covenant being with *S.*, *B.* and *R.* jointly, and running with the land. *Wakefield* v. *Brown*, 209.

2. Effect of words "and also," 209. *Antè*, 1.

II. Running with the land.

1. Covenant to repair by sublessee with lessor, lessee in trust, and cestui que trust, 209. *Antè*, I. 1.

2. Privity of estate, 209. *Antè*, I. 1.

III. Joinder of parties.

Who may sue jointly, 209. *Antè*, 1.

IV. Limitation of actions.

1. Acknowledgment within twenty years, 609. *Limitation*, IV.

2. Special replication, 609. *Limitation*, IV.

COVERTURE.

Baron and Feme.

CREW.

Of chartered vessel, 715. *Charterparty*, I. 1.

CRIMINALITY.

Statutory, how shown in conviction, 669. *Conviction*, IV.

CRIMINAL LAW.

Conspiracy. Indictment.

CRIMINAL PROCEEDING.

What suit for penalties is not, 691. *Clergy*, II. 1.

CROWN LAW.

Certiorari. Indictment. Mandamus.

CURE OF SOULS.

Page 691. *Clergy*, II 1.

CUSTODY.

Proper, 727. *Evidence*, II.

CUSTOM.

I. Immemorial.

Distinguished from usage of trade, 396. *Bank of England*, I. 1.

II. Entireness of.

1. Of custom to contribute to repairs of church and expenses of churchwardens, 179. *Prohibition*, III.

2. Effect, in prohibition, of pleading a smaller custom than that which is alleged in the libel, 179. *Prohibition*, III.

III. Of trade, how pleaded, 396. *Bank of England*, I. 1.

CUSTOMS.

Remedies for the Crown.

Conviction for being found on board vessel liable to forfeiture, 669. *Conviction*, IV.

DAMAGE.

I. Particular.

1. By public nuisance to tenant in

possession and reversioner, 991. *River*, I.

2. Effect of jury negativing the damage, 991. *River*, I.

II. Permanent, how shewn in pleading, 991. *River*, I.

III. Nominal damages.

Assessed on counts some of which are bad, and the jury negative damage on the others, 991. *River*, I.

IV. As a subject for compensation.

1. By breaking up a trade, 443. *Compensation*, II. 2.

2. When assumed on certiorari, 443. *Compensation*, II. 2.

3. What the subject of compensation under public company's act, 443. *Compensation*, II. 2.

DEATH.

Of parties: judgment nunc pro tunc.

What delay the act of the Court.

In a cause in which issues of fact and of law were joined, the plaintiff went to trial on the issues of fact, and had a verdict. The defendant obtained a new trial; and a second verdict was given for the plaintiff. The defendant again moved for a new trial; and the rule was discharged in *Trinity* term, 1844, three years after the first trial. The plaintiff, in the same term, set down the demurrers for argument; but, before the state of business admitted of the case being heard, he died. Judgment was afterwards given for the plaintiff on the demurrers, defendant not appearing.

Held, that leave might be granted to enter up judgment as of *Trinity* term, 1844, the decisson of the issues in law having been delayed till the plaintiff's death by the act of the Court. And such leave was given in a cause consolidated with the former by rule of Court, and not differing from it in any material respect. *Miles* v. *Williams*, 47.

DEBT.

I. Of a third person.

Liability on absolute acknowledgment, 147. *Evidence*, V.

II. On money bond.

1. Pleading, 282. *Bond*, I. 1.

2. Frivolous demurrer, 282. *Bond*, I. 1.

III. For penalties.

1. For carrying party arrested to prison without giving him the required information, 60. *Arrest*, I. 1.

2. Against overseer for not giving copy of rate, 684. *Time*, I. 1.

DECEIT.

I. Manner and description of the fraud.

1. In fraudulently representing to plaintiff that his design was a copy from a registered design.

Delaration in case stated that plaintiff was a printer of silk goods, and had delivered to defendant a lot of such goods, in which were woven fabrics of silk, printed by plaintiff with a design for the ornamenting of them, which had been published by plaintiff to defendant and others; and plaintiff was about to print other fabrics of silk with the same design, and to publish the same in the way of his trade for gain; of all which defendant had notice: but defendant, contriving to deceive, injure and defraud plaintiff, and induce him to desist from printing more with the design, and to deprive him of the gains he would have made, *and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of defendant*, and to put plaintiff to expense, falsely, fraudulently and deceitfully represented to plaintiff that in the lot there was a copy of a registered pattern (see stats. *5 & 6 Vict. c.* 100., *6 & 7 Vict. c.* 65.), and that, the parties having asked defendant for the printer, defendant was obliged to give plaintiff's name; and the parties intended to proceed against plaintiff by injunction and order through the Court of

Chancery (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the *statutes* respecting copyrights of designs, and that the parties interested in the design had asked defendant who was the printer, and defendant had been obliged to give plaintiff's name as printer, and the parties intended to proceed against plaintiff, to prevent him from pirating the design, by injunction and order through the Court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered, according to the *statutes* aforesaid; and there were no parties interested in the design; nor had any parties asked defendant for the printer; nor had defendant given them plaintiff's name; nor did any parties intend to proceed against plaintiff by injunction &c.; as defendant, at the time of making the representation, knew: by means of which representation plaintiff, believing it to be true, was induced to travel a long distance, for the purpose of enquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances; and was induced to abstain from further printing with the design, which he had orders to do, and from selling silk handkerchiefs printed with the design; and defendant, by means of the premises, enjoyed the benefit of the design to the exclusion of plaintiff, and printed with the design, and sold, for his profit, silk handkerchiefs, and took the profits, without the competition of plaintiff, and to his exclusion.

On general demurrer:

Held, that the declaration shewed a cause of action, it appearing that defendant had knowingly uttered a falsehood with the design to deprive plaintiff of a benefit and acquire it to himself, and the damage naturally flowing from plaintiff's belief.

And that the innuendo was unnecessary, and could not therefore be the ground of an objection to the declaration.

The following objections were also disallowed:

That the very words of the representation were not set out;

That the declaration, without the innuendo, did not shew a representation by defendant that the copyright of the supposed parties still existed;

That the truth of the representation was not properly negatived, the averment in that respect mentioning *statutes* in the plural, instead of being confined to stat. 5 & 6 *Vict. c.* 100. *Barley* v. *Walford*, 197.

2. Advertising false representations as to auction, 1015. *Demurrer*, I. 3.

3. Plaintiff's means of knowledge, 197. *Antè*, 1.

4. Connection of the damage with the fraud, 197. *Antè*, 1.

II. Pleading.

1. Innuendo, 197. *Antè*, I. 1.

2. Setting out the false representation 197. *Antè*, I. 1.

DECLARATION.

I. Rule to declare.

In cause removed from inferior Court 869. *Procedendo.*

II. What counts may be inserted together.

On special contract to survey, and common count for work and materials.

A count in assumpsit set forth an agreement of 21st *October*, between plaintiff and defendant, that plaintiff should survey certain lands for an intended railway, and prepare and deposit the plans before 30th *November* next, and forthwith commence the work; and that defendant should thereupon pay him 250*l.* on 22d *October* next, 300*l.* on 15th *November* next, 250*l.* on the plans being deposited with the Board of Trade, and 300*l.* when it should have been adjudged that the standing orders of the House of Commons had been complied with. The count then averred that plaintiff forthwith commenced the work, and

continued it until after the said 15th *November*, but defendant did not pay the 250*l.* on 22d *October*, nor the 300*l.* on 15th *November*.

Held, that a common count for work and materials might be added, without "apparent violation" of *R. G. Hil.* 4 *W.* 4. *General Rules and Regulations*, 5. *Bulmer* v. *Bousfield*, 986.

See 11 *Q. B.* 1.

III. Several counts: effect of.

Effect of plaintiff, an attorney, failing to prove delivery of bill, 847. *Attorney*, VI. 2.

IV. Names.

Names of parties to instrument who are not parties to suit, 361, 427. *Bills*, XIII. 1, 2.

V. Immaterial averments.

Striking out allegations, on summons, 1015. *Demurrer*, I. 3.

VI. In particular instances.

1. On agreement to stay proceedings, 1. *Consideration*, II. 1.

2. For slander in respect of office, 7. *Defamation.*

3. In case for conspiracy to misrepresent character of goods sold by auction, 1015. *Demurrer*, I. 3.

4. For injury by obstruction of navigable river, 991. *River*, I.

5. On substituted arbitrator's award of cornrent, 923. *Arbitration*, V. 1.

6. In action by husband for suing out a ca. sa. and arresting wife, 948. *Baron and Feme*, I. 1.

7. In prohibition, 179. *Prohibition*, III.

VII. In evidence.

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DEDUCTION.

On claiming return of probate duty, 637 *Executors*, III.

DEED.

How shewn in oyer, 282. *Bond*, I. 1.

DEFAMATION.

Slander in respect of office: declaration.

It must connect the slander with the office.

A declaration for slander alleged that plaintiff was a salaried superintendent of police at *L.*, and that it was his duty, as such, to conduct himself temperately and with decency and propriety, while on duty, and to hinder and repress indecent and disorderly conduct in the police office: that defendant, intending to injure plaintiff in his office, and cause it to be believed that he had misconducted himself as such superintendent, and cause him to be dismissed from his office, in a discourse which he had concerning plaintiff, as such superintendent, and concerning plaintiff's conduct in his office, falsely, &c., spoke and published concerning plaintiff, and concerning him as such superintendent, and concerning his conduct in his office, the false, &c. words: "I" (meaning defendant) "saw a letter, two or three days since, regarding an officer of the *L.* police force" (meaning plaintiff), "who" (meaning plaintiff) "had been guilty of conduct unfit for publication."

Judgment arrested, after verdict, on the ground that the declaration did not shew how the imputation was connected by the speaker with plaintiff's office. *James* v. *Brook*, 7.

DEFENCE.

When to be negatived in information, 80. *Conviction*, I. 2.

DEFENDANT.

His remedy for costs, 948. *Baron and Feme*, I. 1.

DE INJURIA.

Replication, 599, 602. *Bills*, XV.

DELAY.

I. When the act of the Court, 47. *Death.*

II. In particular instances.

1. In not setting demurrer down for argument until issues of fact decided, 47. *Death.*

2. In applying to set aside frivolous demurrer, 1015. *Demurrer*, I. 3.

3. In presenting cheque: when immaterial as against drawer, 52. *Bills*, XII.

DEMAND.

I. Of stakes on illegal wager, 431. *Gambling*, I. 1.

II. Bringing an action, when not sufficient as a demand, 431. *Gambling*, I. 1.

DEMURRAGE.

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DEMURRER.

I. Frivolous.

1. For technical informality in replication to tricky plea, 282. *Bond*, I. 1.

2. Discretion of Judge in setting aside, 282. *Bond*, I. 1.

3. Setting aside frivolous demurrer to plea.

A Judge has power to set aside a frivolous demurrer to a plea.

Declaration in case, against *F.*, *S.* and *C.*, charged that defendant *F.* was retained, by the executor of *E.*, to sell by auction the goods which were of *E.*; that defendants had caused to be published certain advertisements announcing the auction, and announcing that a certain quantity of choice wines would be sold thereat, and that they had been the property of *E.*; that defendants, knowing the premises, conspired to bring to the place of sale at the time of the sale wines of inferior quality which had not belonged to *E.* and falsely to represent to plaintiff and others attending the sale that these wines were valuable and had been the property of *E.*, and were sold by order of his executor, and thereby to induce plaintiff and others to purchase them, and thereby to deceive and defraud the purchasers. That defendants did so bring &c., and did so falsely represent &c.; whereupon plaintiff, at request of *F.*, purchased a quantity of such wines, which were worthless, and had not belonged to *E.*, as defendants knew.

The three defendants pleaded separately. *S.* pleaded that he, *S.*, had not caused the advertisements to be published modo et formâ; and *D.* pleaded that he, *D.*, had not. Plaintiff demurred to these pleas, on the ground that the traverses were immaterial. A Judge, on summons, ordered the demurrers to be set aside as frivolous, or that the allegations in the declaration which the pleas traversed should be struck out.

This Court, in banc, held the order to be right.

Although *S.* and *D.*, before obtaining the summons, had obtained time to join in demurrer.

And although *F.*, to whose plea (setting up a different defence) plaintiff demurred also, had joined in demurrer. *Cutts* v. *Surridge*, 1015.

4. Refusal by Court to interfere, 599. *Bills*, XV. 1.

II. Obtaining time to join.

Effect of, 1015. *Antè*, I. 3.

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IV. Demurrer book.

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DEPOSITIONS.

On which conviction proceeds.

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Unreasonable, does not effect jurisdiction to convict, 669. *Conviction*, IV.

DEVISE.

I. Description of devisee.

To male heirs.

Although the general rule is, that to take by purchase under a devise to the male heirs of *W.*, the taker must be both a male and very heir, yet such rule may be controuled where the rest of the devise shews that the devisor intends to give the preference to a male descendant of *W.*, tracing his descent entirely through males, over a descendant, male or female, who should be heir general of *W.* but not trace a descent entirely through males: and the descendant, so apparently preferred, will take to the exclusion of the heirs general of *W.* and of the devisor.

As where, to the words "male heirs of *W.*," was added "if any such there be," and the rest of the devise shewed that the devisor knew that the heir general of *W.*, who traced through a female, was a male, and yet a remainder was limited over to him upon failure of male heirs of *W.*; and the devisor added that the males were to take place first, as long as there were any, through every descent; and also added, to the words of purchase "male heirs of *W.*, if any such there be," the words of limitation "and their male heirs for ever."

J., seised in fee, leased for sixty one years, for a term expiring in 1837, within five years after the passing of stat. 3 & 4 *W.* 4. *c.* 27. (24th *July* 1833). From *J.*'s death, which happened more than twenty years before the passing of the act, *B.* received the rent reserved on the lease, down to its expiration; and he then entered into possession: and afterwards *W.*, within five years after the passing of the act, brought ejectment against *B.*, claiming to be entitled, as *J.*'s devisee, immediately on *J.*'s death.

Held that, under sect. 9, the action would have been barred by *B.*'s receipt of the rent; but that it was preserved by sect. 15 for five years after the passing of the act. *Doe* dem. *Angell* v. *Angell*, 328.

II. Construction.

Control of general rule by particular words of limitations, 328. *Antè*, I.

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1. By mere trustee: when it does not pass legal title, 469, 517. *Copyhold*, II. 1.

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I. Of right of action.

By agreement and performance, 819. *Accord.*

II. In pleading.

Distinction between excuse and discharge, 602. *Bills*, XV. 2.

III. Of bankrupt on his certificate, 1024. *Bankrupt*, IX. 1.

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When not necessary, 555. *Limitation.*

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Notice of, 608. *Bills*, XI.

DISORDERLY HOUSE.

Indictment: certiorari.

On indictment for keeping a disorderly house, the power of the Court to grant a certiorari at the defendant's instance is taken away by stat. 25 *G.* 2. *c.* 36. *s.* 10., whether the prosecution be instituted according to sects. 5 and 6 of that act or in the ordinary course. *Regina* v. *Sanders*, 235.

DISTANCE.

How measured.

As the crow flies, 76. *Poor*, XVIII.

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I. For rent arrere.

At common law: not after expiration of tenancy.

Before stat. 8 *Ann. c.* 14. *s.* 6., rent, accruing before the expiration of a tenancy, could not be distrained for after the tenancy expired, though the tenant continued in occupation.

Therefore, where an avowry for rent arrere is framed at common law, it must be alleged and proved that the tenancy continued up to the time of the distress. *Williams* v. *Stiven*, 14.

II. Pleading.

Allegations essential to the right at common law, 14. *Antè*, I.

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Party interested when not allowed to frame return, 942. *Poor*, XI.

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1. Where lessor is himself only tenant at will, 863. *Limitation*, II. 1.
2. Whether there can be a continuous tenancy at will for more than one year, 863, 867. *Limitation*, II. 1.
3. Not determined by lessor taking conveyance of legal estate, 863. *Limitation*, II. 1.
4. Conversion into tenancy by sufferance, 863. *Limitation*, II. 1.
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III. By sufferance.

1. Conversion of estate at will into, 863. *Limitation*, II. 1.
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1. By former judgment, 759. *Judgment*, IV. 1.

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3. By sessions entry "quashed not on the merits," 878. *Poor*, XXXIII. 1.

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I. Burthen of proof.

1. On motions and rules, 302. *Costs*, I. 1.

2. That an alteration in a foreign bill was made in *England*, 306. *Bills*, II. 1.

3. That defendant was misled by misdescription in notice, 608. *Bills*, XI.

4. Removing depositions to shew conviction on good grounds, 669. *Conviction*, IV.

II. Documentary: proper custody of ancient documents.

Bastardy bonds.

On trial of an issue, a bond to indemnify parish officers against the charge of a bastard was offered in evidence. It was dated in 1716, and was brought from a chest, kept in the workhouse of a Union comprehending the parish, in which chest were kept muniments belonging to the Union. There was no direct evidence how it was placed in the chest: but it was proved that, in 1842, several documents were brought in a cart to the workhouse by a pauper, and placed in the chest.

Held, that enough appeared to satisfy the rule of proving deeds to be brought from a proper depository; and that the evidence was admissible. *Slater* v. *Hodgson*, 727.

III. Documentary: stamp. *Stamp.*

IV. Documentary: examinations.

1. Of persons in custody: very time of tender, 894. *Poor*, XXXIII. 4.

2. Caption or heading, 18, 65. *Poor* XXVII.

V. Admissions: by agent.

By attorney in loose conversation.

Defendant, a widow, being pressed to pay *M.* a debt owing from her deceased husband to the deceased husband of *M.*, signed and gave to *M.*'s attorney the following note, addressed to the attorney. "I beg you will not proceed against me for *M.*, for the sum of 100*l.* and interest, which I owe her; and I will pay the interest, amounting to 9*l.* due on the 23d *December* next, and the principal as soon as I am able."

Held, that this did not support a count in debt for interest upon, and forbearance by *M.* to defendant, at her request, of, moneys owing from defendant to *M.*: nor a count in debt for money found to be due from defendant to *M.* on an account stated between them.

In a discussion between the attorneys of the plaintiff and defendant, touching the dispensing with certain witnesses at the trial, plaintiff's attorney stated to defendant's attorney, that the debt was one owing from the late husband of defendant. Held, that such statement could not be given in

evidence against plaintiff. *Petch* v. *Lyon*, 147.

VI. Admissions: by pleading.

Not allegations which were not traversable, 730. *Agent*, III.

VII. Hearsay: reputation.

Boundaries.

Where a legal manor has once existed, declarations of persons deceased as to its boundary are still admissible, though the manor has ceased to exist otherwise than by reputation. *Doe* dem. *Molesworth* v. *Sleeman*, 298.

VIII. Hearsay: declarations.

Of deceased persons, 298. *Antè*, VII.

IX. Inferential.

1. Of assignment of lease, 365. *Executors*, II. 1.

2. Of authority of receiver for infant ward in Chancery, 623. *Trespass*, I.

3. Of due execution of will attested by marksman of infirm recollection, 648. *Will*, I. 1.

4. Of knowledge by principal from knowledge by agent, 730. *Agent*, III.

5. Of terms of contract, 971. *Poor*, XVII. 2.

X. Effect in evidence of particular facts.

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1. Of liability as a member of a committee, 936. *Company*, II. 1.

2. From which contract for pasture feeding may be inferred, 971. *Poor*, XVII. 2.

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II. Of person in custody, on question of settlement, 894. *Poor*, XXXIII. 4.

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I. When to be negatived in information, 80. *Conviction*, I. 2.

II. How available.

By traverse or by plea in confession and avoidance, 713. *Charterparty*, I. 1.

III. In pleading.

Distinction between excuse and discharge, 602. *Bills*, XV. 2.

EXECUTION.

I. How awarded.

After trial and judgment in Q. B. on issues raised in Chancery, 523. *Patent*, II. 1.

II. Fi. fa.

1. Landlord's claim for rent: execution creditor must pay before sale.

Declaration in case, by execution creditor against sheriff, stated that plaintiff sued out a fi. fa. against *S.*, and delivered it to defendant to be executed; that within defendant's bailiwick were goods of *S.* sufficient to satisfy five writs of fi. fa. after mentioned, and the rent after mentioned, and also the goods of *S.*, whereof defendant might have levied the moneys

directed to be levied by plaintiff's fi. fa.; of which defendant had notice, and took in execution goods of *S.* of value sufficient to satisfy the five other writs, the rent, and plaintiff's writ, but did not, in reasonable time, levy the moneys under plaintiff's writ: but falsely returned that, before the delivery of plaintiff's writ, five other writs of fi. fa. were delivered to defendant, by virtue whereof he took in execution goods of *S.*, which remained in his hands for want of buyers; and that, after the seizure, he had notice that a year's rent was due to the landlord of the premises where the goods were seized, of which plaintiff and the five other execution creditors had notice, but none of them had paid the rent; and that *S.* had no other goods whereof defendant could cause to be made the debt &c. in plaintiff's writ.

Plea: that there were not, at the time of the delivery of plaintiff's writ, and while it remained in force, any goods of *S.*, besides the goods sufficient to satisfy the five other writs and the rent, in defendant's bailiwick, whereof defendant had notice, or could, or might, or ought to have levied the money directed to be levied by plaintiff's writ, in manner and form &c.

Held: That defendant supported his plea by proof that the rent was due, that he had notice thereof, that plaintiff and the other execution creditors had also notice thereof, and that none of them had paid the rent: stat. 8 *Ann. c.* 14. s. 1. prohibiting such a taking and removal of the goods as will amount to a levy, until the rent is paid. *Cocker* v. *Musgrove*, 223.

2. Seizure of goods bound by lien, 592. *Goods*, I.

III. Ca. sa.

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2. Must follow the judgment, 948. *Baron and Feme*, I. 1.

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4. Discharge from, on defendant obtaining his certificate as bankrupt: jurisdiction of Judge and of Court in banc, 1024. *Bankrupt*, IX. 1.

IV. Sheriff's charges.

Who liable to pay, 754. *Attorney*, V. 1.

V. Act of bankruptcy by procuring, 873. *Bankrupt*, III. 1.

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I. Executors de son tort: what interference constitutes.

Not the receipt and conversion of chattels knowingly under an executor de son tort, 365. *Post*, II. 1.

II. Executor de son tort: acts of.

1. Proof of vesting of property by assignment to.

A declaration charging that, on &c., a lease became vested in defendant, "by assignment thereof then made," is supported, without proof of an assignment in fact, by evidence that the lease vested in defendant as executor de son tort.

A party who knowingly receives a chattel from an executor de son tort, and deals with it as his own, does not himself become thereby executor de son tort. So held, where the widow of an intestate possessed herself of a lease, part of his estate, without taking out administration, and handed it to another party, who kept it, and occupied the premises for the residue of the term with the landlord's assent. *Paull* v. *Simpson*, 365.

2. Transfer by to another party, 365. *Antè*, 1.

III. Return of probate duty.

Deductions for debts where probates in two provinces.

Where a testator left personal property in each of the provinces of *Canterbury* and *York*, and probates were

taken out for the property being in each province respectively, and separate duties paid on each probate, and the executors afterwards paid debts indiscriminately out of the whole personalty: Held, that they were not entitled, for the purpose of demanding a return of duty under stat. 5 & 6 *Vict. c.* 79. *s.* 23., to add together the amounts in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, and then estimate the duty payable on the remainder, and demand back the difference between such duty and the aggregate of the sums paid on the two probates.

Semble, that an equitable mode of calculating the sum to be returned was to apportion the sum paid for debts in the ratio of the estates in each province, and deduct the respective portions of the debts from the values of the respective estates. *Regina* v. *Commissioners of Stamps*, 637.

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Negativing, 669. *Conviction*, IV.

FALSEHOOD.

Fraudulent representation, 197. *Deceit*, I. 1.

FALSE PRETENCES.

I. Indictment.

1. Allegation of intent.

An indictment, under stat. 7 & 8 *G.* 4. *c.* 29. *s.* 53., charged that defendant, contriving and intending to cheat *W.*, on a day named, unlawfully, knowingly &c., did falsely pretend to *W.* that he, defendant, *then* was a captain in Her Majesty's 5th regiment of Dragoons, by means of which false pretence defendant did then and there, unlawfully, knowingly &c., obtain of *W.* a valuable security, to wit an order for the payment of 500*l.*, of the value of 500*l.*, the property of *W.*, with intent then and there to cheat *W.* of the same: whereas in truth defendant was not, *at the time of making such false pretence*, a captain &c., and defendant, at the time of making such false pretence, well knew that he was not a captain &c. Held a good indictment, on error after conviction and judgment. For that

It was not necessary to allege more precisely that defendant made the particular pretence with the intent of obtaining the security:

Nor how the particular pretence was calculated to effect, or had effected, the obtaining:

And the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain &c. at the time of his making such pretence, which was the fact denied.

And it was unnecessary to aver expressly that the security was unsatisfied, at any rate since stat. 7 *G.* 4. *c.* 64. *s.* 21., the objection being taken after verdict, and the indictment following the words of the statute creating the offence. *Hamilton* v. *The Queen*, 271.

2. Connection between the pretence and the obtaining, 271. *Antè*, 1.

3. Time how laid, 271. *Antè*, 1.

4. Pretence how negatived, 271. *Antè*, 1.

5. What to be alleged with respect to valuable securities, 271. *Antè*, 1.

6. What objections not available after verdict, 271. *Antè*, 1.

7. Not necessary to state that there were no other pretences, 271. *Antè*, 1.

II. Particular pretences.

That defendant was then an officer, 271. *Antè*, I. 1.

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1. Whether it is necessary to prove the pretence made with the particular intent, 271, 277. *Antè*, I. 1.

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I. Distinction between forfeiture and liability to seizure quousque, 469. *Copyhold*, II. 1.

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2. What variations not fatal, 651. *Lunatic*, I. 1.

3. Equivalent expressions, 651. *Lunatic*, I. 1.

II. What is form and what is substance, 910. *Poor*, XXXIII. 5.

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I. Fraudulent representation, 197. *Deceit*, I. 1.

II. Conspiracy to defraud, 824. *Conspiracy*, II. 1.

III. False pretences. *False Pretences.*

GAMBLING.

I. Illegal game.

1. Derby lottery.

Before the running of a horse-race, several persons, by agreement, subscribed into the hands of a secretary, and deposited with a treasurer, 15*s.* each; the names of the subscribers were then written respectively on cards; and the names of the horses intended to run were written in like manner on other cards; each set of cards was then placed in a box, and the cards drawn out alternately as chance directed: each subscriber was considered as holding that name of a horse which came out next before the drawing of his own name: and the holders became entitled to prizes, varying from 24*l.* downwards, as the horses whose names they held came in first, second, &c., in the race.

Held, in a case arising before stat. 8 & 9 *Vict. c.* 109., an illegal game. And *quære*, whether it would have been affected by sect. 18 of that act.

Per Lord *Denman* C. J. If it be pleaded, to an action for money had and received, that the money was staked on an illegal game, the plaintiff

must shew in answer that he demanded back the stake before it was paid over; the mere bringing an action before payment over not being a sufficient demand.

It is ground of special demurrer, that the Christian names of persons are omitted, and initials, or "Mr.," substituted, if such omission or substitution occurs, not in describing a written instrument, but in stating a transaction between the parties, on which the action turns. Held, therefore, that a plea setting forth the terms of the above illegal game was specially demurrable, because the treasurer and secretary were named, only, as "Mr. *Richards*" and "Mr. *Selway*." *Gatty* v. *Field*, 431.

2. Demand of stake from stakeholder, 431. *Antè*, I.

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I. Property in: lien.

As against execution creditor.

Goods in the possession of *A.* having been taken in execution at the suit of *B.* against *C.* an interpleader issue was directed, to try whether *A.* (plaintiff in the issue) had any property in the goods as against *B.* (defendant in the issue):

Held, that the issue on plaintiff's part was maintained by shewing a lien on the goods for money due to him from *C.* *Rogers* v. *Kennay*, 592.

II. Sale of. *Vendors and Purchasers*, II.

III. Action for goods bargained and sold.

When it will not lie: condition broken, 1030. *Vendors and Purchasers*, II. 1.

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II. Discharge refused because party unsafe to be at large, 651. *Lunatic*, I. 1.

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1. By whom and how the depositions are to be brought up when the Court

is enabled to look at the grounds of conviction, 669. *Conviction*, IV.

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3. A party who takes advantage of it, from what he is precluded.

On motion at Chambers to set aside judgment and execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons the plaintiff's attorney denied having received, the Judge made an order setting aside the judgment and execution without costs, but not embodying any decision as to the irregularity: and he added a direction that the defendant should bring no action. The defendant protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods.

Held that defendant, having thus far availed himself of the order, could not apply to the Court to rescind that part which forbade bringing an action. *Pearce* v. *Chaplin*, 802.

4. To set aside demurrer as frivolous, 1015. *Demurrer*, I. 3.

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IV. Judgment recovered.

1. Pleading.

Debt for 400*l.*, viz. 200*l.* for goods sold and delivered, and 200*l.* on an account stated. Pleas, as to the residue of the cause of action (after pleas as to 43*l.* 6*s.* 9*d.* parcel &c.): First, that plaintiff impleaded defendant in respect, among other things, of the said residue, in assumpsit, to plaintiff's damage of 400*l.*, and such proceedings were had that plaintiff recovered against defendant 314*l.* 8*s.*, as well for his damages in the said action, and in respect whereof plaintiff had impleaded defendant, as for his costs and charges, whereof defendant was convicted, as by the record &c.; and which judgment has not been reversed. Secondly, as before, adding that defendant, before plaintiff had declared in the present action, paid and satisfied plaintiff the amount recovered, and plaintiff acknowledged himself to be satisfied the damages, costs and charges so recovered; as by the record &c. Replication to each plea, that the said residue was not, nor was any part thereof, the causes of action in respect of which the judgment was recovered. Verdict on these issues for defendant.

Judgment, by the Court of Q. B. for the plaintiff, non obstante veredicto.

Held, by the Court of Exchequer Chamber, reversing the judgment in Q. B.: That the pleas were good after verdict, and defendant entitled to judgment.

That, assuming the pleas to mean that as to part of the claim in the first action plaintiff recovered, and as to the residue of such claim it was found no more was due, the objection that this should have been pleaded by way of estoppel was formal only, and could not be made after verdict.

But, assuming the meaning to be (and *semble* this was so) that plaintiff, having once had a judgment, could not have judgment again for the same debt, the pleas were substantially good.

And that after the finding of the jury, the plaintiff could not contend that the part now claimed of the debt might have become due since the recovery in the first action.

Semble that, on special demurrer, the pleas would have been bad for not averring that the recovery, as well as the impleading, was in respect of the residue. *Todd* v. *Stewart*, 759.

2. Estoppel or bar, 759. *Antè*, 1.

3. Evidence of identity, 759, 769. *Antè*, 1.

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When obtained, and how.

A defendant cannot, without special application to a Judge, have a rule for a special jury before issue joined, although, being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for the special jury a sufficient number of days before trial. *Sayer* v. *Dufaur*, 800.

II. Question for.

Reasonable time, may be, 684. *Time*, I. 1.

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X. Metropolitan police, 617. *Limitation*, V.

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2. By assent to irregular assignment, 365. *Executors*, II. 1.

3. By underletting: when not an assignment, though nothing left in lessee.

Where a party, entitled to a term in land, demises the land to another, at a weekly rent, for the whole of such term, and it is the intention of the two to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quitted accordingly.

Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising. *Pollock* v. *Stacy*, 1033.

4. By mortgagee receiving rent from lessee of mortgagor, 1037. *Mortgage*, III. 1.

II. Assignment.

1. Necessity for a writing under stat. 29 *Car. 2. c. 3. s. 3.*, 365. *Executors*, II. 1.

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1. Distress at common law, 14. *Distress*, I.

2. Under stat. 8 *Ann. c.* 14. *s.* 1. before removal of goods taken under *fi. fa.*, 223. *Execution*, II. 1.

3. Action for use and occupation; for whole term notwithstanding a previous quitting on notice, 1033. *Antè*, I. 3.

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II. Of actions: stat. 3 & 4 *W.* 4. *c.* 27.

1. Sects. 2, 7.: twenty years' occupation. By tenants at will and at sufferance.

R. C., the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will. The son occupied, and built a cottage on, the land. Afterwards *R. C.* took a conveyance from the vendor; and, some time after, he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty one years of his entry. The son's widow continued to occupy till the expiration of twenty one years from her husband's entry.

Held, that an action of ejectment afterwards brought against her was barred by stat. 3 & 4 *W.* 4. *c.* 27. *ss.* 2, 7. For that the tenancy at will was not determined by the father's taking a conveyance: and that, if it had, in point of law, been so determined by that event, or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will: and the tenancy, altogether, had continued more than twenty years from the end of the first year. *Doe* dem. *Goody* v. *Carter*, 863.

2. Occupation by permission of parent: devise for life.

In 1801, *D.*, being seised of land in fee, permitted his daughter *J.* and her husband *M.* to occupy as tenants at will. *D.* died in 1837, after the passing (24th *July* 1833) of stat. 3 & 4 *W.* 4. *c.* 27., but before the expiration of the five years allowed by sect. 15. He devised the land to *J.* for life, remainder to *W.* in fee. He also devised to *J.* an annuity charged on other land.

J. and *M.* occupied from 1801 to *J.*'s death in 1843, no rent being paid. After *J.*'s death, *M.* continued in occupation.

On ejectment brought in 1844, by *W.*, the remainder-man, against *M.*, Held:

That *W.* was not entitled to insist that *J.* and *M.* had held under the devise to *J.*: but that *M.*, although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will.

That sect. 15 was inapplicable, no step having been taken within the five years. And

That the action was barred, under sects 2 and 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will. *Doe* dem. *Dayman* v. *Moore*, 555.

3. Sect. 9. What receipt of rent will bar, 328. *Devise*, I.

4. Sect. 15. Reservation of five years, 328. *Devise*, I.

5. From what period the statute runs, 555. *Antè*, 2.

6. Existence of other right as to part of the period, 555. *Antè*, 2.

7. Five years' period: when and how available, 555. *Antè*, 2.

III. Interruption.

What transactions inter alios are no interruption, 863. *Antè*, II. 1.

IV. Of actions: stat. 3 & 4 *W.* 4. *c.* 42.

Covenant: acknowledgment.

To a declaration in covenant for nonpayment of money, defendant pleaded that the cause of action did not accrue within twenty years. Replication that it did accrue within &c.

Held, under stat. 3 & 4 *W.* 4. *c.* 42. *ss.* 3, 5., that plaintiff could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years. *Kempe* v. *Gibbon*, 609.

V. Of actions: against justices.

Metropolitan police magistrate.

The time limited for bringing actions against justices of a Metropolitan police district in respect of a conviction under stat. 2 & 3 *Vict.* *c.* 47. *s.* 18., made in exercise of the jurisdiction given them by stat. 3 & 4 *Vict.* *c.* 84. *s.* 6,. is three calendar months, the period prescribed by stat. 2 & 3 *Vict.* *c.* 71. *s.* 53., and not six calendar months, the period given by stat. 10 *G.* 4. *c.* 44. *s.* 41.

The Metropolitan Police Acts above mentioned are not local and personal within the meaning of stat. 5 & 6 *Vict.* *c.* 97. *s.* 5.; and therefore the times limited by the statutes respectively for the bringing of actions are not altered by that clause. *Barnett* v. *Cox*, 617.

VI. Of actions: under local and personal acts.

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To heirs male as purchasers, 328. *Devise*, I.

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LUNATIC.

I. Order under stat. 8 & 9 *Vict.* *c.* 100.

Statement of particulars in order.

Under stat. 8 & 9 *Vict.* *c.* 100. *ss.* 44, 46. Schedules (B.), (C.) an order for confinement of a lunatic in a licensed house is not necessarily invalid if the party giving it does not insert statements as to all the particulars in schedule (B.), or state expressly that he does not know them.

It is a sufficient statement, as to the "special circumstances," "preventing the insertion of any of above particulars," that the lunatic is "constantly watched by an attendant whom she fears."

Under schedule (C.) a medical certificate is sufficient which states, as grounds for the opinion that the party is insane, "that she labours under delusions of various kinds;" and "that she is dirty and indecent in the extreme."

A medical practitioner, signing the certificate, instead of the words "from the following fact or facts," inserted, "from the conversation I have had this day with the said" lunatic. Held sufficient, without more.

Where, on return to a habeas corpus, it is stated that the party confined is of unsound mind, and unfit and unsafe to be at large, the Court will not order such party to be discharged from a licensed house, though the order and certificates be not such as to fulfil the requisites of stat. 8 & 9 *Vict.* *c.* 100. *ss.* 45, 46., and schedules (B.), (C.). *Shuttleworth, In re*, 651.

2. Medical certificate: grounds of opinion, 651. *Antè*, 1.

3. Medical certificate: variation from statutory form, 651. *Antè*, 1.

4. Provisions how far merely directory, 651. *Antè*, 1.

5. Refusal to discharge for irregularity, 651. *Antè*, 1.

II. Confinement at common law.

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III. Habeas corpus ad subjiciendum.

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IV. Pauper, 159. *Poor*, XXXVII. 1.

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II. Stipendiary, 458. *Compensation*, I. 1.

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1. To enter continuances and hear appeal, 41. *Poor*, XXXVI.

2. To compensate officer, 458. *Compensation*, I. 1.

3. To return probate duty, 637. *Executors*, III.

4. To collector to register ship, 806. *Shipping*, I. 1.

5. To issue distress warrant, 942. *Poor*, XI.

6. To summon compensation jury, 980. *Post*, III.

II. When it does not lie, or is refused.

1. To reimburse moneys paid under void order, 159. *Poor*, XXXVII. 1.

2. To overseers to permit inspection of their appointment, 794. *Poor*, IV. 3.

3. To justices to issue warrant of commitment on nonpayment of penalty, 976. *Conviction*, VIII. I.

III. Rule.

Not amended to agree with writ.

A mandamus to a railway company to summon a compensation jury was obtained on affidavits shewing that the applicant had a claim for the value of land in his occupation, taken by the Company, and likewise for damage done to his remaining land by severing it, and had asserted both claims to the Company. By mistake, the rule was drawn up for a mandamus to summon a jury who should assess the value of the land, and omitted to mention damages for severance. The mandamus was drawn, including both, and was quashed on motion, as varying from the rule. The Court refused, on motion, to amend the rule, so as to make it agree with the writ.

But they afterwards, on the original affidavits, and on counsel's statement of the mistake, granted a mandamus including both objects: Lord *Denman* C. J. dubitante. *Regina* v. *East Lancashire Railway Company*, 980.

IV. Writ.

Quashed as varying from rule, 980. *Antè*, III.

V. Second mandamus.

When granted after first has been quashed, 980. *Antè*, III.

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1. By party interested, on mandamus to justices, when not allowed, 942. *Poor*, XI.

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I. Nemo ex alterius facto prægravari debet, 52. *Bills*, XII.

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V. Transit in rem judicatam, 759. *Judgment*, IV. 1.

VI. Ut res magis valeat quam pereat 1033. *Landlord and Tenant*, I. 3.

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1. When the mortgagee may eject.

A., seised in fee, mortgaged in fee to *B.*, and afterwards leased to defendant. *D.* purchased the legal estate from *B.*, and also the equitable estate from a party who derived it from *A.*, which party also joined in the conveyance of the legal estate.

Held, that *D.* though he had received rent from defendant, was not bound by *A.*'s lease to him, but might recover against defendant in ejectment, after expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent. *Doe* dem. *Lord Downe* v. *Thompson*, 1037.

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Whether legally distinguishable from misfeasance, 315. *Corporation*, III.

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1. When not taken of facts which do not appear by plea or statute, 396. *Bank of England*, I. 1.

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3. That certain offices are public annual offices, 663. *Poor*, XIX. 1.

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1. Of appeal against order of removal, 41. *Poor*, XXXVI. 2.

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1. Not equivalent to consent, 744. *Attorney*, IX.

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I. Inserting the whole deed at the head of the plea, 282. *Bond*, I. 1.

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I. What is a parochial tax, 261. *County rate*, II.

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I. In lunacy orders and medical certificates, 651. *Lunacy*, I. 1.

II. In avowries, 130. *Replevin*, II. 1.

III. In negativing exceptions, 563. *Company*, I. 1.

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Who is, 302. *Costs*, I. 1.

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When allowed to frame return to mandamus to justices, 942. *Poor*, XI.

PASTURE.

Contract for pasture feeding, 971. *Poor*, XVII. 2.

PATENT.

I. Scire facias to repeal: sending into Q. B. for trial.

1. How entered in Q. B.

A scire facias to repeal letters patent was issued out of Chancery, returnable there; appearance entered, declaration filed, plea pleaded, and issue joined, in the Petty Bag Office. The case was then sent to the Court of Queen's Bench for trial; and the entry here was, that the Chancellor, with his own hand, delivered "*a record.*" On motion (by a party bringing error) to amend by substituting the words "transcript of a record:" Held that the entry did not require amendment. *Regina* v. *Bynner*, 529 n.

2. Amendment when refused, 529 n. *Antè*, 1.

II. Scire facias to repeal: judgment after verdict for crown.

1. By what court to be pronounced.

On scire facias, brought in the Petty Bag Office in Chancery, to repeal letters patent for an invention, if issues of fact are joined there, and the record sent to the Queen's Bench for trial, which is had, and a verdict found for the Crown, the Queen's Bench, though the letters patent remain in Chancery, may give judgment that they be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, quashed and annulled, and that they be restored to the Court of Chancery, there to be cancelled.

Semble, that for execution of the judgment that the enrolment be can-

celled, it would be sufficient to send a transcript of the record to the Court of Chancery by certiorari and mittimus, that Court having only a ministerial duty to perform in cancelling the patent after the judgment in B. R. *Bynner* v. *The Queen*, 523.

2. Sending transcript of record to Court of Chancery, 523. *Antè*, I.

III. Cancelling of.

By what Court and on what judgment, 523. *Antè*, II. 1.

PAUPER.

I. When ordered to pay the costs of the day.

Where a county had been divided by order in council under stat. 3 & 4 *W.* 4. *c.* 71. *s.* 3. for the purpose of trial of causes, and a party suing in formâ pauperis brought an action, which, by stat. 21 *Ja.* 1. *c.* 12. *s.* 5., was local, in the wrong division, and discovering the mistake at the assizes, withdrew the record, and obtained leave to amend, the Court, on motion under *Reg. Gen. Hil.* 2 *W.* 4. I. 110., ordered him (though not dispaupered) to pay costs of the day for not proceeding to trial. *Thompson* v. *Hornby*, 978.

II. Pauper lunatic.

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I. By holding for a party's use, 396. *Bank of England*, I. 1.

II. Of dividends.

1. By warrant, 396. *Bank of England*, I. 1.

2. Negotiability of the warrant, 396. *Bank of England*, I. 1.

3. Pleading, 396. *Bank of England*, I. 1.

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1. In usual manner, 396. *Bank of England*, I. 1.

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I. Tricky plea of, 282. *Bond*, I. 1.

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How shewn in pleading, 991. *River*, I.

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Of payment.

Mistake as to, in notice of dishonour, 608. *Bills*, XI.

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Where he has himself contributed to the injury, 713. *Charterparty*, I. 1.

PLEA.

I. Nature of.

Distinction between excuse and discharge, 602. *Bills*, XV. 2.

II. Defects in.

1. Not answering the whole, 179. *Prohibition*, III.
2. Not answering ad idem, 179. *Prohibition*, III.
3. Departure from right alleged in inferior court, 179. *Prohibition*, III.
4. Tricky: frivolous demurrer to replication to, 282. *Bond*, I. 1.

III. Particular pleas.

1. Illegal sale of shares in joint stock company before complete registration, 563. *Company*, I. 1.
2. Acceptance on agreement not to sue, 602. *Bills*, XV. 2.
3. Nondelivery of attorney's bill, 847, 858. *Attorney*, VI. 1.
4. To count on account stated, 858. *Attorney*, VI. 1.
5. Tricky plea of performance, 282. *Bond*, I. 1.
6. Payment of negotiable warrant to holder, 396. *Bank of England*, I. 1.
7. Illegal game, 431. *Gambling*, I. 1.
8. That plaintiff and wife sued certain persons for libel, and had judgment against them for costs, whereupon defendant as attorney caused ca. sa. to be issued, 948. *Baron and Feme*, I. 1.
9. Under warrant to levy amercement, 130. *Replevin*, II. 1.
10. Former recovery, 759. *Judgment*, IV. 1.

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I. Burthen of allegation.

1. On party impeaching transaction as illegal, 563. *Company*, I. 1.
2. With respect to bringing the case within a statute. *Brooks* v. *Bockett*, 855. *Scadding* v. *Eyles*, 858.

II. Matters essential to the right or defence pleaded.

1. Continuance of tenancy, in avowry at common law, 14. *Distress*, I.
2. That custom is immemorial in the particular place, 396. *Bank of England*, I. 1.
3. That payment was according to an usage of trade of which the plaintiff was cognisant, 396. *Bank of England*, I. 1.
4. That payment by dividend warrant is a usual mode, 396. *Bank of England*, I. 1.
5. That an act indifferent in its own nature is rendered criminal by statute, 669. *Conviction*, IV.
6. Identity, in plea of former recovery, 759. *Judgment*, IV. 1.

III. Directness and positiveness.

In avowry under a presentment, 130. *Replevin*. II. 1.

IV. Confession.

1. Sufficient to make replication de injuriâ good, 602. *Bills*, XV. 2.
2. Charges "by the plaintiff claimed and demanded," sufficient, 858. *Attorney*, VI. 1.

V. The whole of the opposite pleading must be answered.

1. Plea in prohibition bad, as not noticing issues in fact alleged in the declaration, 179. *Prohibition*, III.

VI. Generality.

1. When bad, 130. *Replevin*, II. 1.

2. In negativing exceptions, 563. *Company*, I. 1.

3. In charging conspiracy, 824. *Conspiracy*, II. 1.

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XI. Under a videlicet.

Matter made material by subsequent pleading, 282. *Bond*, I. 1.

XII. Duplicity.

1. Readiness to serve and tender of service, when not double, 137. *Contract*, XVII. 1.

2. Traverse not casting on plaintiff proof of more than necessary to maintain declaration, 164. *Post*, XX.

3. Breach by nonpayment of principal and interest, not double, 282. *Bond*, I. 1.

XIII. Departure.

1. In plea from custom asserted in libel, 179. *Prohibition*, III.

2. "Railway shares" no departure from "goods and chattels," 563. *Company*, I. 1

XIV. Admission by.

Not traversable allegations, 730. *Agent*, III.

XV. Materiality.

1. Of allegation traversed, 164. *Post*, XX. 819. Accord, 1015. *Demurrer*, I. 3.

2. Of matter laid under a videlicet, 282. *Bond*, I. 1.

XVI. Legal effect.

Vesting by operation of law pleaded as an assignment, 365. *Executors*, II. 1.

XVII. Traverse: materiality.

1. Traverse of readiness and willingness, 164. *Post*, XX.

2. Plea of discharge by agreement and performance: traverse of agreement, 819. *Accord.*

3. Demurrer to, as immaterial, 1015. *Demurrer*, I. 3.

XVIII. Whether to traverse or to plead in confession and avoidance.

Matter of excuse, 715. *Charterparty*, I. 1.

XIX. Time.

1. "From," when inclusive, 187. *Contract*, XVII. 1.

2. "Then," when sufficiently descriptive, 271. *False Pretences*, I. 1.

3. Default before action brought, how shewn, 282. *Bond*, I. 1.

4. Time of default how shewn, 282. *Bond*, I. 1.

5. That custom is immemorial in particular place, 396. *Bank of England*, I. 1.

6. Permanence of injury how shewn, 991. *River*, I.

XX. Conditions concurrent: readiness and willingness.

When traversable, and when not.

Declaration stated that, by agreement between plaintiff and defendant, two brothers, defendant, in consideration of natural affection and for other considerations him moving, agreed to permit plaintiff to occupy lands of defendant to 29th *September*, plaintiff paying a sum named as rent on that

day, as he thereby agreed to do, and then to deliver up the premises to defendant; and, upon plaintiff so quitting the premises, paying the rent, and releasing defendant from all claims under their father's will, and quitting claim to all lands which were of the father, which plaintiff agreed to do, defendant would pay plaintiff 200*l.*, with interest from 29th *September:* and it was agreed that all deeds and releases to be required by defendant should be prepared by his attorney at his expense. Averment of mutual promises; and that plaintiff, on 29th *September*, was ready and willing to deliver up the premises to defendant, and to pay the rent, and was at all times, from the making of the agreement, ready and willing to release &c. That, although 29th *September* and a reasonable time thence for the payment of the 200*l.* had elapsed, and no release was prepared by defendant's attorney, defendant had not paid the 200*l.*, with interest. Plea: that plaintiff was not ready and willing to quit and deliver up, and to pay the rent. On special demurrer:

Held: that the performance of plaintiff's promises and that of defendant's undertaking to pay were conditions concurrent; and therefore the averment, in the declaration, of readiness and willingness was sufficient without averment of actual performance, but that such averment of readiness &c. was material; and, consequently, the traverse in the plea answered the declaration. And that the plea was not double, because plaintiff was bound to be ready &c. both to pay and to deliver possession, and the plea cast on the plaintiff no more proof than was necessary to maintain the declaration.

Another plea traversed the plaintiff's readiness and willingness to release. On special demurrer:

Held bad, because it was averred in the declaration that no release was prepared by defendant's attorney as provided in the agreement, and therefore plaintiff's readiness to execute it, if prepared, was immaterial. *Giles* v. *Giles*, 164.

XXI. Names.

1. Of parties to a mercantile instrument who are not parties to the suit, 361, 427. *Bills*, XIII.

2. Christian names of third parties when required, 431. *Gambling*, I. 1.

3. Substitution of "Mr." when not sufficient, 431. *Gambling*, I. 1.

4. Ignorance of, insufficiently alleged, 431. *Gambling*, I. 1.

XXII. Oyer.

What set out and when, 282. *Bond*, I. 1.

XXIII. Conclusion.

With a verification, 282. *Bond*, I. 1.

XXIV. Defects cured by pleading over.

A possible construction which would cause the pleading to be no answer, 759. *Judgment*, IV. 1.

XXV. Defects cured by verdict.

Informal pleading of an estoppel, 759. *Judgment*, IV. 1.

XXVI. Construction. *Construction*, III.

POLICE.

Metropolitan, 617. *Limitation*, V.

POLICY.

Assignment of, 730. *Agent*, III.

POOR.

I. Poor law commissioners.

Costs on shewing cause against motion for certiorari, 291. *Post*, III.

II. Government of: district.

1. United parishes, 241. *Post*, XIII.

2. Parish under board of guardians, 291. *Post*, III.

III. Workhouse: order of commissioners.

What consent required.

Where, by order of the Poor Law

Commissioners, under stat. 4 & 5 *W.* 4. *c.* 76. *s.* 39., guardians are appointed to administer the poor law in a single parish, the consent to an order for building a workhouse in such parish, under sect. 23, must be given by a majority of the guardians, as it is, in the case of a union, under sect. 38; and not by a majority of the rate-payers.

When the Poor Law Commissioners, under the privilege given by stat. 4 & 5 *W.* 4. *c.* 76. *s.* 106., shew cause in the first instance against a motion for a certiorari, and succeed, the Court will grant them costs, if proper ground appear for it, though the general rule of practice is that a party shewing cause in the first instance shall not have costs. *Regina* v. *Poor Law Commissioners*, re *St. Mary Abbots, Kensington*, 291.

IV. Parish officers: overseers.

1. Who are overseers, 626. *Post*, XXV. 2.

2. Debt against, for not giving copy of rate, 684. *Time*, I. 1.

3. Mandamus to permit inspection of their appointment refused.

This Court refused a mandamus commanding overseers to permit a rate-payer to inspect their appointment by the justices, he deposing that he believed one of the overseers was not a substantial householder or a fit person to be overseer; that, as he, the applicant, was advised, the appointment was bad in law; and that he was desirous of bringing it before the Court, but could not do so without inspecting the appointment, which he had endeavoured without success to obtain. *Regina* v. *Harrison*, 794.

V. Parish officers: notice to.

Of binding apprentice, 70. *Post*, XXVIII.

VI. Parish funds.

When mandamus does not lie to repay moneys paid under void order, 159. *Post*, XXXVII. 1.

VII. Parish documents: proper depository.

Bastardy bonds, 727. *Evidence*, II.

VIII. Rate: exemption clauses.

Lands of public company to be rated as lands of private individuals, 261. *County Rate*, II.

IX. Rate: collateral effects.

With respect to county rate, 261. *County Rate*, II.

X. Rate: right to copy.

Reasonableness of the time left to the jury, 684. *Time*.

XI. Rate: how resisted.

Mandamus to issue distress warrant: return by party rated when not allowed.

On mandamus, commanding justices to issue a warrant of distress for poor rate against a rated inhabitant, this Court, in the exercise of their discretion, refused to allow the return to be made on his behalf, and framed by him, under stat. 1 *W.* 4. *c.* 21. *s.* 4., the justices opposing, and it appearing that the objections to the rate, relied upon by him, were technical or frivolous and such as, if valid, might have been made on appeal, and that he was actuated by a wish to harass the parish; and he not deposing to his belief in the validity of the proposed objections. *Regina* v. *Cheek*, 942.

XII. Rate: how enforced.

By distress warrant, 942. *Antè*, XI.

XIII. Settlement: effect of statutory alteration in the district.

Union of parishes.

A pauper gained a settlement in parish *I.* afterwards, by act of parliament, *I.* was united, for all but ecclesiastical purposes, with parish *B.*, by the title of The United Parishes of *I.* and *B.*

Held, that the pauper was settled in the united parishes. *Regina* v. *St. Martin, New Sarum*, 241.

XIV. Settlement: by birth.

1. Forty days' residence not required, 626. *Post*, XXV. 2.

2. Wife's birth settlement, 626. *Post*, XXV. 2.

XV. Settlement: by marriage.

Removal of widow to maiden settlement without enquiry into that of husband, 626. *Post*, XXV. 2.

XVI. Settlement: requisite residence.

1. How stated: "during," 663. *Post*, XIX. 1.

2. Forty days' residence, when not requisite, 626. *Post*, XXV. 2.

XVII. Settlement: by renting a tenement.

1. Time of occupying several tenements together: how alleged, *Regina* v. *Honley*, 666 n.

2. Cow tenement: evidence of contract for pasture feeding.

On an appeal, the alleged settlement depended on the occupation of a tenement by the pasture feeding of a cow. The cow had been hired of a farmer in the appellant parish, and had been fed in pasture on the farm in that parish during the pasture season, and in the straw yard during winter; and the pasture feeding was of value sufficient to make up the settlement: but it was expressly found by the Session that, at the time of the hiring, nothing was said as to the manner in which, or the particular lands whereon, the cow was to be fed.

Held, that the Sessions were not entitled to infer a contract that the cow should be pasture-fed. *Regina* v. *Mendham*, 971.

XVIII. Settlement: by estate.

The ten miles, how measured.

Stat. 4 & 5 *W.* 4. *c.* 76. *s.* 68. enacts that no person shall retain a settlement, gained by possessing an estate or interest in a parish, for a longer time than he shall inhabit "within ten miles thereof."

Held, where the pauper resided out of the parish, that these words mean ten miles measured in a direct line from the residence to the nearest point of the parish. *Regina* v. *Saffron Walden*, 76.

XIX. Settlement: by office.

1. Assessor and collector of land tax, &c.

The Court will take notice that the offices of assessor and collector of the land tax and assessed taxes are "public annual" offices, within the meaning of stat. 3 *W.* & *M.* *c.* 11. *s.* 6.

A statement, in a ground of appeal, that the pauper "served" the offices in question, "to which said offices he was duly and legally appointed," imports that he served those offices "for himself and on his own account" within the meaning of stat. 3 *W.* & *M.* *c.* 11. *s.* 6.

A statement, in a ground of appeal, that the pauper served the offices for certain specified years, "*during which years* he was an inhabitant and resident" in *C.*, imports that he inhabited and resided in *C.* during the whole of those years. *Regina* v. *Anderson*, 663.

2. How set forth in grounds of appeal, 663. *Antè*, 1.

XX. Settlement: by hiring and service.

1. What is not an imperfect apprenticeship.

By written agreement between *W.* and *B.* (*B.* not appearing to be connected with any other party to the agreement, except by its terms), of the one part, and *O.* of the other part, *W.* agreed to hire, and *O.* to be hired, for three years, to dress silk. For the first three months from the commencement of *O.*'s working under the agreement, he was to receive 10*s.* per week; after that time to dress silk on a frame at 2½*d.* per pound for foreign waste, and 3*d.* per pound for home waste, provided he dressed seventy two pounds of foreign waste for double yarn, and sixty pounds of home waste for single yarn, per week. For all he did, over and above the said weights of waste, he should receive for foreign waste 4*d.* per pound, and for home waste 4½ per pound; and for what his work averaged short of the above mentioned

weights, of seventy two pounds and sixty pounds per week, he should be subjected to be deducted or abated $4\frac{1}{2}d.$ and $4d.$ per pound for each description of dressed waste deficient of the aforesaid weekly quantity. And *B.* should receive of *W.* 6*s.* per week, for superintending and instructing *O.*, in the best manner he was capable, to make him a competent workman: *B.* to be answerable for the work being done in a proper manner. *B.* was to receive $4d.$ per pound for foreign waste, and $4\frac{1}{2}d.$ per pound for home waste, for his own work, during the time of the agreement.

Held (1.) That this was a contract for the hiring of *O.*, and not an imperfect contract of apprenticeship: (2.) That it was not an exceptive hiring. *Regina* v. *Northowram*, 24.

2. What qualifications as to quantity of work do not make the hiring exceptive, 24. *Antè*, 1.

3. What hiring is exceptive: full day's work: pit bond.

Pauper executed a pit bond, by which he and others were hired from 5th *April* 1826 to 5th *April* 1827, to hew, work, &c. coals in a colliery, and to do such other work as might be necessary for the colliery, and be required by the owners, at the prices, and on the terms, conditions, &c. after mentioned. By clause 2 the owners were to allow the workmen during the whole period of the hiring so much work as would amount to 28*s.* a fortnight, but might, if they deemed it expedient at any time to work only nine days in a fortnight, *lay the pits off work* for the other days, allowing the men to earn 28*s.* each in the nine days; and, by clause 6, the owners might *lay the pits off work* for ten working days at *Christmas*, but the men were nevertheless *to continue, during such time and all other times that the pits should be laid off work, the servants of the owners*, and liable to be employed by them in such work as they should see fit. There was also, in clause 7, provision for a payment to the men if by accident to the engine, or other cause, a pit should be rendered unfit for working. Clause 8 provided that the men, unless prevented by sickness &c., *should do a full day's work on every working day and not leave their work until such day's work was finished*, to the extent of each man's ability, under certain penalties in case of default: and that the owners should be at liberty to require work from the men on the pay *Saturdays* as well as on every of the week days. By other clauses, the dwelling houses provided for the men were to form part of their wages, and to be delivered up on expiration &c. of the hiring; and the occupier of such house was to keep the glass of the windows in repair: and none of the parties hired was to keep any galloway, ass or dog.

Held an exceptive hiring, no control being reserved to the employers after performance of a full day's work; and, it being found, in a case stated by the sessions, that the stipulation for continuance of service when the pits should be *laid off work* applied only to the specific occasions mentioned in clauses 6 and 7, and not to the cessation after performance of a full day's work under clause 8. *Regina* v. *Walbottle*, 248.

XXI. Settlement: by apprenticeship.

1. What hiring with a view to teaching is not, 24. *Antè*, XX. 1.

2. Parish apprenticeship: notice of binding, 70. *Post*, XXVIII.

XXII. Settlement: evidence.

Examination of person in custody: very time of tender, 894. *Post*, XXXIII. 4.

XXIII. Chargeability.

Objection in ground of appeal to statement of, 626. *Post*, XXV. 2.

XXIV. Maintenance.

Of pauper lunatic under order made without jurisdiction, 159. *Post*, XXXVII. 1.

XXV. Removal: complaint.

1. Must appear by the heading of the examinations, 65. *Post*, XXVII. 2.

2. By whom: overseers.

Under a statement, as ground of

objection to an order of removal, that the pauper does not appear by the examinations to have been "actually chargeable to your said parish" when the order was made, the appellants cannot object that the pauper does not appear by the examinations to have been resident in the removing parish at the time.

Birth confers a settlement without a residence of forty days.

Where an order of removal described the pauper as a widow, and the examination mentioned the name of her deceased husband, but did not shew whether he had any settlement, nor that any inquiry had been made on the subject: Held, that she might be removed to the place of her birth settlement.

An order of removal stated that it was made on the complaint of the overseers of the removing parish, not mentioning the churchwardens. Held sufficient. *Regina* v. *Watford*, 626.

XXVI. Removal: examinations.

What is a defect in form, and what a defect in substance, 110. *Post*, XXXIII. 5.

XXVII. Removal: heading of examinations.

1. Each must shew jurisdiction.

A parish removing paupers transmitted examinations, the first of which purported to be made touching the last legal settlement of the paupers, and to be taken by justices whose jurisdiction sufficiently appeared. In the margin were the words, "County of *Leicester*, to wit." The next examination had the same marginal words, and purported to be taken, "touching the above named settlement," and "before us the said justices:" their names were subscribed, and were the same as those subscribed to the first examination: but there was no other other statement shewing their jurisdiction.

Held, that the latter examination was bad: for that each of the examinations, on which an order of removal is made, must contain in itself every statement necessary to shew jurisdiction, and the want of such statement cannot be supplied by reference from one examination to another. *Regina* v. *Ratcliffe Culey*, 18.

2. Must shew examination taken on proper complaint.

The examinations taken before removing justices were headed, "*Huntingdonshire* to wit. The examination of" &c., "at present residing" &c., "taken on oath, this 22nd day of *March*, 1845, before us, two of Her Majesty's justices of the peace in and for the said county, touching the place of the last legal settlement of" *M.* Held that the order of removal founded thereon was bad, the examinations shewing no jurisdiction, as it did not appear on the face of them that they were taken on a proper complaint.

Although, in a case stated by the Sessions for this Court, it appeared to have been proved, on the trial of the appeal, that a complaint was duly made, and that the examinations were taken, and order made, on the hearing of such complaint. *Regina* v. *Molesworth*, 65.

5. Defects not supplied by reference, 18. *Antè*, 1.

XXVIII. Removal: copies of examinations: not of evidence offered on the other side.

On application for an order of removal, the justices, besides the witnesses produced on behalf of the removing parish, examined others at the request of an attorney who appeared for the parish to which the removal was to be made. This last evidence was not transmitted with the other examinations, nor taken down in writing.

Held that stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79. was sufficiently complied with by sending the other examinations.

Where a pauper is bound apprentice under stat. 56 *G.* 3. *c.* 139., it is sufficient, under sect. 2., if a notice of the intended binding, directed generally to the overseers of the parish into which the apprentice is to be bound, is served on one of such overseers. *Regina* v. *Holme*, 70.

XXIX. Removal: order.

1. Bad as not appearing to have been made within the jurisdiction.

An order of removal, having "borough of *D.*" in the margin, reciting a complaint of the overseers of a parish in the borough of *D.* to *R.* and *K.*, "being two of her Majesty's justices of the peace having jurisdiction with and for the said borough," and not otherwise shewing that the order was made within the jurisdiction, is bad.

And the Court quashed the order, and an order of sessions affirming it, the two being brought up by a certiorari, granted, in the first instance and without a rule to shew cause, by fiat of a Judge at Chambers. *Regina* v. *Newton Ferrers*, 32.

2. Complaint how stated, 626. *Antè* XXV. 2.

XXX. Appeal against order of removal.

To what sessions, 41. *Post*, XXXVI. 2.

XXXI. Appeal against order of removal: respite for want of notice.

Though there had been time to give notice, 41. *Post*, XXXVI. 2.

XXXII. Appeal against order of removal: statement of grounds.

1. Objection to statement of chargeability does not let in objection to statement of residence, 626. *Antè*, XXV. 2.

2. Statement of settlement by public annual office, 663. *Antè*, XIX. 1.

3. What offices the Court will take notice of, 663. *Antè*, XIX. 1.

4. What imported by allegation of appointment and service, 663. *Antè*, XIX. 1.

5. Effect of the word "during" in defining time, 663. *Antè*, XIX. 1.

6. General denial, when insufficient, 894. *Post*, XXXIII. 4.

XXXIII. Appeal against order of removal: former order quashed.

1. Former order of sessions how far conclusive.

The sessions, on appeal, quashed an order of removal "not upon the merits," and "without prejudice to the making of any other order" to remove the same pauper. On appeal against a subsequent order,

Held that the appellants were not at liberty to shew, by parol evidence, that the first order of sessions was made on such grounds as, though the sessions deemed them merely technical, did legally conclude the question of settlement. *Regina* v. *St. Anne's, Westminster*, 878.

2. Order quashed not on the merits, 878. *Antè*, 1.

3. Explanation by evidence of the ground of the former decision.

An order of justices under stat. 9 *G.* 4. *c.* 40., adjudicating on the settlement of a pauper lunatic, and directing the officers of parish *A.* to pay for his maintenance in a house for reception of lunatics, was quashed on appeal, subject to a case. The case submitted, as questions for this Court, whether a former order of sessions, quashing a former order of justices touching the settlement and maintenance of the same lunatic pauper, on appeal by parish *A.* was or was not conclusive; and whether the then present order of justices was valid or not, inasmuch as it directed payment, not to the county treasurer, but to other parties. This Court, on argument of the special case, gave judgment against the then present order of justices; and it was quashed. A third order, adjudging the settlement to be in *A.*, and directing payment by *A.* for the maintenance of the same pauper, was appealed against and quashed subject to a case The case stated the former judgment of this Court, and the reasons given by the Court, from which it appeared that the then order of justices was quashed on the last point only.

Held that the quashing of the last mentioned order by judgment of this Court might be explained by evidence of the reasons; and that the opinion

delivered by the Court, as stated in the present case, was evidence that such order was not quashed on the ground that the settlement was not proved; for which reason, the quashing was not conclusive.

Semble, per Lord *Denman* C. J., *Coleridge* and *Wightman* Js., that, under stat. 9 *G.* 4. *c.* 40., the quashing of an order of justices as to settlement and maintenance of a lunatic pauper, though not on formal grounds, is not necessarily conclusive, but that, by sect. 42, a subsequent order, made on new inquiry, may be valid. *Regina* v. *St. Peter's, Droitwich*, 886.

4. What entry sufficiently general to admit explanation.

On appeal against an order of removal, the appellants offered evidence of a former judgment of quarter sessions quashing an order of removal founded on the same alleged settlement. The order of sessions, as entered on their minutes, stated that the order of removal was quashed "on the ground *that the examinations are insufficient to support the same*." Held that this entry was general enough to let in evidence on the part of the respondents that the adjudication proceeded on matter of form, not merits.

To make the examination of a person in custody admissible under stat. 59 *G.* 3. *c.* 12. *s.* 28., on a question of settlement, it must be proved expressly that the party was in custody, as required by the statute, at the very time when such examination was tendered in evidence.

The wife and children of *R. B.*, were removed on examinations shewing settlement of *R. B.* by hiring and service under *C.*, and by birth. The appellants stated as distinct grounds of appeal: That the parents of *R. B.* were removed to, and acknowledged as settled inhabitants by, a third parish, and that he had acquired no settlement in his own right: That *R. B.* did not become settled in the appellant parish by hiring and service under *C.*: And: That the paupers were *not settled in the appellant parish in any manner whatever*. Held that the appellants could not give evidence that *R. B.* was not born in the appellant parish. *Regina* v. *Widecombe in the Moor*, 894.

5. Order quashed by this Court on special case, in general terms: what may be explained, and how.

An order of removal, and an order of Sessions confirming it, were quashed by this Court, on a case stated for their opinion, because the examination, relied upon as shewing a settlement by renting a tenement, stated that "*rent*," and not "*the rent*," was paid. The respondents again removed the paupers to the appellant parish, which appealed again, relying upon the former judgment in Q. B. as an estoppel. On a case stated by the sessions, confirming the latter order subject to the opinion of this Court, it appeared that, in the former case, the sessions had stated that, if this Court held the objection good, the order of removal was to be quashed "*for deficiency in the examination:*" it appeared also that the judgment of this Court was, simply, that the orders should "*be severally quashed*." Held,

1. That the respondents were not estopped by the former judgment in Q. B.; but might have shewn (if they had been able) that it proceeded on matter of form only.

2. That the appellants were at liberty, if necessary, to shew by evidence (which the sessions had not allowed them to do) that the judgment turned on matter of substance.

3. That the objection, admitted on the present case to have been as above stated, was substantial and valid.

4. That the quashing of the former orders by this Court, being general in terms, and not explained by evidence, must be deemed a quashing on the merits.

5. That, if the provisional judgment of the sessions in the first special case could be looked to, the words "for deficiency of the examination" might have been explained by evidence, or by a special entry, to mean a deficiency merely formal: but that unexplained, they must be taken to import a substantial defect. *Regina* v. *Leeds*, 910.

6. On respondent's motion after notice of abandonment.

Where appellants against an order of removal have delivered grounds of appeal containing objections of form, and respondents, having given notice of abandonment, apply to have their own order quashed, such quashing is not conclusive, though there be, in the grounds of appeal, other objections going to the merits, and though the notice does not specify the grounds of abandonment.

Therefore, where, under such circumstances, the sessions had quashed the order, with an entry. "Order quashed, without any special entry, as the Court have no evidence before them to enable them to make such entry:" Held, that a subsequent Court of Quarter Sessions, on appeal against a new order bringing the same settlement into question, might properly decide that the quashing was not conclusive. *Regina* v. *Landkey*, 905.

7. What objection conclusive, 910. *Antè*, 5.

8. Effect of quashing generally, no explanation being given, 910. *Antè*, 5.

9. Effect of quashing "for deficiency of the examination," 910. *Antè*, 5.

XXXIV. Appeal against order of removal: abandonment by respondents. Quashing not conclusive, 905. *Antè*, XXXIII. 6.

XXXV. Appeal against order of removal: special entries.

How far conclusive. 878, 894, 905. *Antè*, XXXIII.

XXXVI. Appeal against order of removal: mandamus.

1. Costs when given to the successful party.

When cause is shewn against a rule for a mandamus, the Court, in the exercise of its discretion, under stat. 1 *W.* 4. *c.* 21. *s.* 6., will in general order costs to be paid by that party to the application who ultimately fails to that party who ultimately succeeds: but the rule is not invariable.

Where, however, the sessions had dismissed an appeal on a frivolous preliminary objection (namely, that the notice of appeal purported to be given not by the churchwardens and overseers, but, as the fact was, by a majority of the churchwardens and overseers acting on behalf of all), and a motion was made for a mandamus to the justices to enter continuances and hear the appeal, against which motion the respondents, and not the justices, shewed cause, and the mandamus issued and was obeyed: Held, that the respondents might properly be required to pay the costs of the motion for a mandamus and of the writ, although, in shewing cause, they had upheld the judgment of a Court, given in their favour. *Regina* v. *Surrey, Justices*, 37.

2. Costs when given to successful party.

Appellants against an order of removal are entitled to enter and respite the appeal at the sessions next following the order, without giving notice, though more than thirty five days (stat. 4 & 5 *W.* 4. *c.* 76. *ss.* 79, 81.) have elapsed between the receipt of the order and the holding of the sessions; and to have the appeal tried, upon notice at the next sessions after.

The sessions having refused to hear an appeal, because more than thirty five days had elapsed between the receipt of the order and the next sessions, this Court granted a mandamus, calling upon them to enter continuances and hear. And, the writ having been obeyed, costs were granted to the appellants on motion, though the respondents, in opposing the rule nisi for a mandamus, supported a judgment of the sessions in their favour; and though the appellants ultimately succeeded, not on the question of settlement, but on the omission of the respondents to send with the examinations a document referred to in them. *Regina* v. *London, Justices*, 41.

XXXVII. Pauper lunatic: stat. 9 *G.* 4. *c.* 40.

1. Indemnification against expenses incurred under a bad order.

Two justices of the county of *R.*,

assuming to act under stat. 9 *G.* 4. *c.* 40., directed the parish officers of *H.*, in that county, to pay certain sums to the keeper of a house for the reception of insane persons in the county of *S.*, for the maintenance of an insane person, whose settlement they, by the same order, adjudged to be in *H.* *H.* made payments under this order, but appealed: the order was confirmed at sessions; but, on a case reserved, the orders of justices and of sessions were quashed by this Court, on the ground that the two justices of *R.* had no jurisdiction.

Held, that this Court could not award a mandamus, calling upon the justices of *R.* to direct their county treasurer to repay to *H.* payments which that parish had made under the first mentioned order from the time of its being granted to the time of its being quashed. *Regina* v. *Radnorshire, Justices*, 159.

2. Explaining by evidence the grounds on which a former order was quashed, 886. *Antè*, XXXIII. 3.

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1. The judgment of the Queen's Bench becomes the judgment of the sessions, 886. *Antè*, XXXIII. 3.

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When a cause has been removed from an inferior court by habeas corpus at the defendant's instance, and no further step taken on either side for a year, the plaintiff may apply ex parte for a procedendo to issue unless bail in this Court be given within four days. And the bail below cannot move to set aside such procedendo when issued, until they or the defendant have put in bail in this Court. *Blanchard* v. *De la Crouée*, 869.

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II. Practice.

Where a prohibition is applied for the Court will always, on the demand of the party against whom the application is made, put the party applying to declare in prohibition. *Remington* v. *Dolby*, 176.

III. Pleading: declaration.

Good as shewing parties at issue on matters of temporal cognizance.

Declaration in prohibition recited that *F.* was a parish, in which was an immemorial parish church, and that the inhabitants, from time immemorial, repaired the church, &c., there by rates on lands, &c., within *F.*: that *D.* (the plaintiff) was churchwarden of *F.*: that *R.* (defendant), being churchwarden of parish *L.*, cited *D.* in the Spiritual Court, in a cause of subtrac-

tion of churchrate, and, in the libel, alleged: (1) That *F.* was a hamlet in parish *L.*; (2) That there was a custom by which the inhabitants of *F.* supported their own church (called chapel in the libel), and contributed to the support and reparation of the parish church of *L.*, *and all expenses and charges necessarily laid out by the churchwardens of L.*, in the proportion of three eighths; (3) That the parish church of *L.* needed repairs, and the rate payers of *L.* made a rate towards them, of which three eighths ought to have been paid by the inhabitants of *F.* according to the custom. The count then stated that *D.* gave in a negative issue to the libel, denying its allegations. That afterwards, and after the libel had been admitted to proof, *D.*, by personal answers, pleaded: (1) That *F.* was not part of parish *L.*; (2) Admitting that the inhabitants of *F.* supported their own church, but denying that there was a custom by which they contributed to the support and reparation of the parish church of *L.*, *and all or any of the expenses and charges necessarily laid out and expended by the churchwardens of L.*, in the proportion of three eighths; (3) Admitting the need of repairs, and the rate, but denying that three eighths ought to be paid by the inhabitants of *F.* according to any custom. That afterwards *D.* alleged and articulately propounded that *F.* was a distinct parish, and had a parish church, which had been immemorially repaired and maintained by the parishioners of *F.*; that *F.* was not within the parish of *L.*; that there was not a custom by which the inhabitants of *F.* contributed to the support and reparation of the parish church of *L.* (not noticing the general allegation as to *all expenses and charges* &c.) in the proportion of three eighths, and that there was no custom that the inhabitants of *F.* contributed in the proportion of three eighths, or any other proportion, to the maintenance and reparation of the parish church of *L.* The count then stated that the suit was still pending, and defendants were proceeding therein. Wherefore plaintiff prayed a writ to prohibit the Judge of the Spiritual Court, and *R.* from further holding plea in any matter touching the premises.

Held, on demurrer to a plea, a good declaration, as shewing that the parties were at issue upon two questions of fact, and which were of temporal cognizance: viz. whether *F.* was part of *L.*, and whether there was such a custom as alleged in the libel.

Plea: that there was a custom by which the inhabitants of *F.* supported their own chapel and contributed to the support and reparation of the parish church of *L.* (not noticing the general allegation as to "*all expenses and charges*" &c.) in the proportion of three eighths, in manner and form as in the libel alleged.

Held bad, on demurrer, as not asserting the custom alleged in the libel, and as not noticing the other issue in fact respecting the parochiality of *F.*, *Dolby* v. *Remington*, 179.

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1. Bad as relying on a custom different from that asserted in the libel, 179. *Antè*, III.

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Avowry stated that plaintiff was an inhabitant and resident within a manor, which had an immemorial court leet, to which he owed suit and service; that the jury of the court was sworn, according to the immemorial custom of the manor, to examine weights and measures within the manor; that they proceeded to do so, but plaintiff, while they were so proceeding, "knowingly and unlawfully obstructed the said jurors in such examination;" that the obstruction was presented, and plaintiff amerced, and defendant, as bailiff, in

execution of a warrant, &c. to collect the amercement, took plaintiff's goods as a distress.

On special demurrer, Held:

That the nature of the act of obstruction ought to have been more specifically stated; and the avowry was therefore bad, as the presentment was not a sufficient answer in an action of replevin, without a direct averment that the fact presented took place. *Frost* v. *Lloyd*, 130.

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A count in case, stating that plaintiff

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But, if the jury negative the actual damage, plaintiff cannot have judgment.

A count stating plaintiff to be reversioner of premises, occupied by his tenants, and abutting on a public navigable river, and that plaintiff and all the liege &c. were accustomed of right to have free navigation and passage on the river for boats &c., and plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the same, and pass to the premises from the river, and unload the boats on the premises without obstruction; but that defendant fixed barges, planks, &c. in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises from the river, and hindered the unloading of boats on the premises, and by means thereof plaintiff was injured in his reversionary interest, is bad in arrest of judgment, as not shewing a damage to the reversionary interest. *Dobson* v. *Blackmore*, 991.

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of a rate "forthwith" upon demand and offer of payment, the complaint being that the defendant had used undue delay:

Held, that it was not the Judge's duty to tell the jury, as a direction in point of law on the facts proved, that the copy was or was not given forthwith: but that he was right in leaving it to them to say whether, under the circumstances, it had or had not been given in reasonable time, and therefore, according to reasonable construction, "forthwith." *Tennant* v. *Bell*, 684.

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and by command, of *T.* Replication, traversing the command.

T. was a minor and ward in Chancery, and defendant the receiver and general agent for the estate.

Held, that from this the jury might infer a general authority to do the act, and, if they so inferred, ought to find for the defendant. And that, upon this issue, the plaintiff was not entitled to shew that he held under a lease, and to insist that the act was therefore such as an infant could not authorize. *Ewer* v. *Jones*, 623.

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Where goods are sold on condition that, if they are not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute.

Therefore, if the vendee do not pay at the time, and the vendor resell at a loss, he cannot maintain assumpsit for goods bargained and sold, or goods sold and delivered.

And the defence may be raised on Non assumpsit. *Lamond* v. *Davall*, 1030.

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Held that, upon this evidence, a jury might infer a due execution of the will under stat. 29 *C.* 2. *c.* 3. *s.* 5. *Doe dem. Davies* v. *Davies*, 648.

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